(25,062)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 779.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

	Original.	Print
Caption	a	1
Transcript of record from the Knox circuit court	a	1
Pleas	b	1
Præcipe for record	1	1
Petition	2	2
Motion to make petition more specific	6	3
Order giving time to answer	6	4
Motion to make petition more specific	7	4
Order overruling same	9	5
Order filing answer	10	6
Answer	10	6
Order filing motion to require plaintiff to give deposition	14	8
Motion to require plaintiff to give deposition	15	8
Affidavit of Hiram H. Owens	16	9
Deposition of Nathan Parker	17	9

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1916.

	Original.	Print
Order filing deposition of Nathan Parker	19	10
Order filing amended answer	20	11
Amended answer	20	11
Order sustaining motion to take deposition	22	12
Order of arrest	22	12
Offering to file amended petition	23	12
Amended petition	23	12
Order filing affidavit of J. M. Robsion	27	14
Affidavit of J. M. Robsion	27	14
Affidavit and statement for witnesses	29	16
Order for witnesses	30	16
Filing affidavit of Nathan Parker	32	17
Affidavit of Nathan Parker	32	18
Order refusing amended petition	33	18
Order controverting answer	34	18
Order offering second amended answer	35	19
Second amended answer	35	19
Order overruling motion to file second amended answer	37	20
Motion *non obstante veredicto*	37	20
Order overruling same	37	21
Verdict and judgment	38	21
Order filing motion and grounds for new trial	39	21
Order overruling same	40	22
Order giving time to file bill of exceptions	41	22
Order tendering bill of exceptions	42	22
Order filing bill of exceptions	43	22
Motion and grounds for new trial	44	24
Bill of exceptions	50	27
Instructions to jury	51	27
Defendant's requested instructions refused	54	29
Amended petition	56	30
Motion and grounds for new trial	59	32
Motion and grounds for new trial overruled	64	35
Judge's certificate to bill of exceptions	64	35
Clerk's certificate	66	36
Power of attorney to Black & Owens	67	36
Supersedeas bond	69	37
Testimony of Nathan Parker	71	38
Peter Scalf	75	41
Scy Banks	84	46
Sam Parker	91	51
George Tobias	97	55
J. M. Robsion	137	80
Sam Parker (recalled)	139	81
Eli Cain	143	84
Motion for verdict overruled	150	88
Testimony of P. L. Wilson	150	88
W. R. Town	190	111
L. & N. R. R. Co. form blank No. 70	219	128
Testimony of S. H. Adams	223	130
Way bills	224	130

	Original.	Print
Testimony of T. B. Colson	229	133
H. E. Harris	234	136
Exhibit H. E. H. No. 1—Freight checks	239	138
Exhibit H. E. H. No. 2—Freight checks	240	138
Testimony of E. L. Wilson	242	139
W. R. Town (recalled)	244	140
G. M. Wells	245	141
Nathan Parker	250	144
Court's admonition	250	144
Motion to direct verdict, etc., overruled	250	145
Motion to exclude testimony	251	145
Instructions to jury offered by defendant	252	145
Certificates of reporter and judge	254	146
Statement	256	147
Order submitting case	257	147
Orders and judgments	257	147
Opinion	258	148
Order filing petition for rehearing	273	154
Petition for rehearing	274	155
Response to petition for rehearing	287	162
Reply to response to petition for rehearing	294c	166
Order filing additional authority on petition for rehearing	294	170
Additional authority in support of appellant's petition for rehearing	294	171
Opinion of supreme court by Mr. Justice McReynolds in case of Pennsylvania Company *vs.* Donat, November 1, 1915	295	171
Orders allowing time	296	172
Order overruling petition for rehearing	296	173
Order of appellant filing notice	297	173
Order of appellee filing objection	297	173
Notice of appeal	297	173
Motion to stay mandate	298	173
Objection to appellant's motion	299	174
Petition for writ of error and allowance	300	174
Writ of error	301	175
Writ of error bond	303	177
Assignment of errors	305	178
Præcipe for transcript of record	309	180
Clerk's return to writ of error	314	183
Citation and service	315	183

a COMMONWEALTH OF KENTUCKY:

Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky at the Capitol, in Frankfort, on June 18, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
EDWARD PARKER'S ADMINISTRATOR, Appellee.

Appeal from the Knox Circuit Court.

Be it remembered that heretofore, to-wit, on July 25, 1914, the Appellant, Louisville & Nashville Railroad Company, by its counsel filed in the office of the Clerk of the Court of Appeals a transcript of record in words and figures following, to-wit:

b Pleas Before the Hon. F. D. Sampson, Judge of the Knox Circuit Court, at the Court House Thereof, in the City of Barbourville, Knox County, Kentucky, on the 26 day of January, one thousand and nine*teen* hundred and fourteen.

Be it remembered, that on the 4th day of August, 1913, there was filed in the Office of the Clerk of the Knox Circuit Court, the following petition, to-wit:

1 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Schedule.

The clerk of the Knox Circuit Court will please copy for the Kentucky Court of Appeals the entire record in this case, except you will not copy the Transcript of Evidence nor return of summons. This May 12, 1914.

BLACK, BLACK & OWENS,
Attorneys for Defendant.

Said Schedule is endorsed: Filed in office of Clerk, this 12th day of May, 1914. W. H. McDonald, Clerk, by J. L. Hopper, D. C.

2 Knox Circuit Court.

NATHAN PARKER, Adm'r of the Estate of Edward Parker, Deceased, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

The plaintiff Nathan Parker states that he was by order of the County Court of Knox County on the 5th day of July 1913 appointed Administrator of the estate of Edward Parker, deceased, and he accepted said appointment, took the oath, and qualified as such administrator, and he is now the qualified and acting administrator of the said estate, that an attested copy of said order will be filed if required, that the defendant Louisville & Nashville Railroad Company is a corporation, organized under the laws of this Commonwealth and that it is now and was at the time of the injury complained of herein, the owner of and engaged in operating a line of railroad extending through Knox and Bell Counties in this state, and that it does now and did at the time of the injury complained of herein, own, maintain and operate a switch yard at Middlesboro, Ky., where trains, engines, and cars were and are shifted and moved about for defendant company, that on or about the 30th day of June, 1913, his said intestate was employed by the defendant company as a fireman on one of its engines, on said switch yard at Middlesboro, Kentucky, and while in the line of his duty as fireman on one of its engines and while exercising ordinary care
3 for his own protection, his decedent was through and by the gross negligence of the defendant company, its officers, agents and servants in charge of the said switching yards, and in charge of the tracks, trains, engines, and cars, on said switch yard, caught and struck by a caboose and car on one of the tracks on said switch yard, and which caboose and car was not in the clear, and obstructed the passage of the engine on which his decedent was working, and his decedent was thereby greatly injury in his head and other parts of his body, and from which injury his decedent immediately died. The plaintiff further states that the defendant company, its officers and agents and servants, in charge of the said switch yard, the trains, engines and cars thereon, and superior in authority to this decedent, negligently and carelessly furnished to his decedent a dangerous and unsafe place to work, and negligently and carelessly failed to furnish him a reasonably safe place to work, and negligently furnished to him an engine that was not equipped with lights, and was in a dangerous and unsafe condition, and which rendered his decedent's place of work and employment dangerous and unsafe, and negligently placed his decedent at work on the said engine in the night time without sufficient lights or any lights, and negligently set and placed a caboose and cars on one of the switches and tracks on said yard so that the same were not

in the clear, and so that the engine upon which his decedent was employed as fireman would not clear, and he was caught by said cars and was mashed and killed, and the defendant negligently laid and constructed and maintained the switches, tracks, and switch yard in a dangerous and unsafe manner, and same were
4 in a dangerous and unsafe condition at the time and before the death of his decedent. And the officers, agents and servants in charge of the said engine, cars, tracks and switch yard, and superior in authority to his decedent, managed and operated said engine, trains and cars and switch yard, in a grossly negligent manner, and the injury and death of his decedent was caused and brought about by the gross negligence of the defendant company, its agents and servants, and his decedent would not have been injured or killed but for the gross negligence of the defendant company, its officers, agents and servants.

Plaintiff states that the defendant company, its officers, agents and servants, in charge of the said engine switch yard, tracks and cars and trains knew or by the exercise of ordinary care could have known of the defective dangerous and unsafe condition of the said engine, that the said caboose and cars were not in the clear, and of the dangerous and unsafe conditions of his decedent's place of work, and the *damages* and unsafe condition of the said switches, tracks and switchyards, in time to have avoided the injury to his decedent.

The plaintiff states that the estate of his decedent was and is damaged by reason of the negligence of the defendant company, the injury and death of his decedent, in the sum of $30,000.00, and no part of same has been paid, and the plaintiff ought to recover the said sum.

Wherefore the plaintiff prays judgment against the defendant for the sum of $30,000.00 in damages. He prays for his cost and all proper relief.

J. M. ROBSION,
Attorney for Plaintiff.

5 Said petition is endorsed as follows: Filed in the office of the Clerk of the Knox Circuit Court, Tax paid, summons and 1 copy issued. This 4th day of Aug. 1913. W. H. McDonald, C. K. C. C.

6 Knox Circuit Court, Sept. Term, 7th Day, Sept. 8, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order. [*Motion.*]

Comes defendant and moves the court to require the plaintiff to make the petition more specific and definite.

Knox Circuit Court, September 19, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

The defendant is hereby given until Rule day in October in which to file its answer.

7 Knox Circuit Court.

NATHAN PARKER, Adm'r of the Personal Estate of Edward Parker, Deceased, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

The defendant, Louisville & Nashville Railroad Company, moves the court to require plaintiff to make his petition in this action more specific and definite by stating therein the character of commerce, whether interstate or intrastate *or intrastate,* he claims defendant was engaged in, and the deceased, Edward Parker was performing, at the time the latter received the injury resulting in his death, stated in said petition, and whether plaintiff instituted this action, and will rely in its prosecution, under the Kentucky Statute, Section 6 of Chapter 1, Kentucky Statutes, or under the Act of Congress, approved April 22, 1908, and entitled, "An act relating to the liability of common carriers by railroad to their employees in certain cases". Because defendant was at all the times stated in said petition including the time the decedent, Edward Parker, received the injury which resulted in his death, stated in said petition, a common carrier by railroad, engaged in commerce between different States of the United States, and known as interstate commerce. It was also engaged as a common carrier by railroad in intrastate commerce, and the said decedent suffered his said injury while he was employed by
8 defendant, and engaged for defendant, in interstate commerce, And therefore, whether, the one or the other of said Statutes, the said Kentucky Statutes *of* the said Act of Congress, applies to, and controls, the proper adjudication of this action, depends upon the facts not stated in said petition.

Wherefore defendant prays the Court to require plaintiff to make more definite and specific, and that he make more definite and specific, the statements of the petition in this action by setting out therein the facts not stated therein, which omitted facts will, when and as thus set out in said petition, show and determine *that* one

of the aforesaid statutes *which* applies to, and controls, the proper adjudication and settlement of this action.

LOUISVILLE & NASHVILLE RAILROAD CO.,
By BLACK, BLACK & OWENS, *Attorneys.*

Said motion is endorsed as follows: Filed in open court, Sept. 3, 1913. W. H. McDonald, Clerk, K. C. C.

9 Knox Circuit Court. September 19, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

At a former day of this Court, the defendant, Louisville & Nashville Railroad Company, entered its written motion to the court to require plaintiff to make more definite and specific the statements of the petition in this action by setting out therein the facts not stated therein, which omitted facts will as defendant claims when thus set out, show and determine the character of commerce, whether interstate or intrastate defendant was engaged in, and the deceased, Edward Parker was performing at the time he received the injury mentioned in the petition, and requiring plaintiff to state under which statute the Kentucky Statute, or the act of Congress, approved April 22, 1908, and entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases", he has instituted and will rely upon in the prosecution of his case. And the Court having considered said motion, now orders and adjudges that said motion be and the same is hereby overruled. To which ruling of the court the defendant excepts.

10 Knox Circuit Court, Rule Day, Oct. 6, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the defendant and filed answer.

Knox Circuit Court.

NATHAN PARKER, Adm'r of the Personal Estate of Edward Parker, Deceased, Plaintiff,
vs.
LOUISVILLE AND NASHVILLE R. R. Co., Defendant.

Answer.

The defendant, Louisville & Nashville Railroad Company, for its answer to the petition in this action, denies plaintiff's intestate, Edward Parker, while in the line of his duty as fireman on one of defendant's engines in Middlesboro, Kentucky, or while exercising ordinary care for his own protection, was, through or by the gross negligence, or by any negligence of defendant, or of any one or more of defendant's officers, or agents, or servants in charge of the switch yards mentioned in said petition, or in charge of any of the tracks, or trains, or engines, or cars on said switch yard, caught or struck by a caboose and car, or either, on any track on said switch yard, and defendant denies the caboose and car mentioned in said
11 petition, were not, or that either of them was not, in the clear, or obstructed the passage of the engine on which said intestate was working.

And defendant denies the said decedent was thereby injured in his head or any other part of his body, or that he died from any injury which was inflicted on him in the manner as stated in said petition.

And defendant denies it, or any one or more of its officers, or agents or servants in charge of said switch yard, or of any of the trains, or engines or cars thereon, or any one superior in authority to decedent, negligently, or carelessly or otherwise furnished to decedent a dangerous or unsafe place in which to work, or negligently, or carelessly or otherwise failed to furnish him a reasonably safe place in which to work, or negligently or otherwise furnished to him an engine which was not equipped with lights, or which was in a dangerous or unsafe condition, or which rendered the place of work of decedent or his employment dangerous or unsafe, or negligently placed decedent at work on said alleged engine, or in the night time, or without sufficient lights, or that defendant, or anyone or more of its said officers, or agents or servants negligently

or otherwise, set or placed a caboose and any car or either, on any of the switches or tracks on said yard, or so that the same were not, or so that either of same was not in the clear, or so that the engine upon which decedent was employed as fireman, was not in the clear, or that said decedent was caught by said cars and mashed or killed.

And defendant denies defendant negligently laid, or constructed or maintained any of the switches, or tracks, or switch yard, mentioned in the petition in a dangerous or unsafe manner, or that they were, or that either of them, was, in a dangerous or unsafe condition at the time or before the death of the decedent.

12 The defendant denies any one or more of the officers, or agents or servants in charge of the said engine, or cars, or tracks or switch yard, or who were or was, superior in authority to decedent, managed or operated said engine, or trains or train, or cars, or car, or switch yard, in a grossly negligent manner, or in a negligent manner, or that the injury and death of decedent were, or that either his injury or death was, caused or brought about by the gross negligence or by any negligence of defendant, or of any one or more of defendant's agents or servants.

And defendant denies decedent would not have been injured or killed, but for the gross negligence, or of any negligence of defendant, or of any one or more of its officers, or agents or servants.

And defendant denies defendant, or any one or more of its officers, or agents or servants in charge of the engine or switch yard, or tracks, or cars, or trains, mentioned in the petition, knew, or by the exercise of ordinary care, could have known, of the defective, or dangerous or unsafe condition of said engine, or that said caboose and cars were not, or that either of them was not in the clear, or of the dangerous or unsafe condition of the place of work of decedent, or of the dangerous or unsafe condition of any of said alleged switches, or tracks, or switch yards in time to have avoided the injury to decedent, and defendant denies the said alleged engine was either dangerous or in an unsafe condition, or that the alleged caboose and cars were not, or that either of them was not, in the clear, or that the place of work of decedent was either dangerous, or in an unsafe condition, or that

13 the condition of any of said switches or tracks, or said switch yard, was in a dangerous or unsafe condition at the time mentioned in the petition.

And defendant denies the estate of decedent was or is damaged by reason of any negligence of defendant, in the sum of $30,000, or in any sum, and it denies either the injury or death of decedent was caused by any negligence of defendant, or that plaintiff ought to recover of defendant any sum.

Wherefore defendant prays the Court to dismiss the petition in this action, and to adjudge that plaintiff take nothing by it. It prays for all other proper relief, herein.

LOUISVILLE & NASHVILLE R. R. CO.,
By BLACK, BLACK & OWENS, *Attorneys.*

Said answer is endorsed as follows: Filed Rule Day, Oct. 6, 1913. W. H. McDonald, Clerk K. C. C.

14 Knox Circuit Court, Rule Day, Oct. 6, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the defendant by attorney, and filed its motion to require same, and files answer.

Knox Circuit Court, November 5, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the defendant, by attorney, and filed its motion to require the plaintiff, Nathan Parker, to give his deposition in this action, and also filed a copy of the order of Clara Mertinkat, examiner, assessing fine against the said Parker.

15 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE R. R. Co., Defendant.

Motion.

Defendant, Louisville & Nashville R. R. Co., comes now and moves the Court to grant a rule against plaintiff, Nathan Parker, to appear before some officer of this Court, and give his deposition for the defendant in the above styled action, as is required under Subsection 8 of section 606 in the Civil Code of Practice. Defendant files herewith the report of Clara Mertinkat, examiner of Knox County, showing that the said Parker refused to give said deposition, and also in support hereof, the affidavit of H. H. Owens, attorney for defendant.

Wherefore defendant prays the judgment of the Court.

BLACK, BLACK & OWENS, *Attorneys.*

16 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE R. R. Co., Defendant.

Affidavit.

Affiant, H. H. Owens, says that he is one of the attorneys defendant herein, and familiar with the defense which defendant will, if permitted so to do, make herein, and that same is a proper defense, and that to properly prepare defendant's side of this case, it is necessary that plaintiff, Nathan Parker, give his deposition as on cross-examination for the defendant as is required and authorized under the Civil Code of Practice. He says that without said deposition, defendant cannot properly prepare its defense herein.

HIRAM H. OWENS.

Subscribed and sworn to before me by Hiram H. Owens this — day of November, 1913.

CLARA MERTINKAT,
Examiner, Knox County.

17 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE R. R. Co., Defendant.

Depositions for Defendant.

The deposition of plaintiff, Nathan Parker, taken at the law office of Black, Black & Owens pursuant to notice, and under sub-section 8 of section 606 of the Civil Code, and as on cross examination as provided for under said section, to be read as evidence in behalf of defendant on the trial of this action.

The witness, being by me first duly sworn, states in answer to questions as follows:

1. State your age, residence, and occupation?

A. Witness refuses to be sworn.

Q. Now, Mr. Parker, the defendant desires in good faith to take your deposition in this case, and I now request you to be sworn and give said deposition. Will you do so?

Plaintiff by counsel objects to the foregoing question, and suggests that he is very busy engaged with matters at his office, and that Mr. Parker will be present at Court and testify if the defendant desires

him to do so, and now suggests that plaintiff do not give his deposition at this time.

A. I guess not.

The witness refused to give his deposition, and refused to answer questions propounded, and refused to be sworn, and I as examiner before whom the deposition was attempted to be taken, hereby assess a fine against the witness, Nathan Parker, of $5.00, and hereby again request the witness to give his deposition, and said witness left
18 the room and refused to give his deposition, and I as examiner for Knox County hereby certify this matter to the Judge of the Knox Circuit Court for action.

Given under my hand as examiner for Knox County this Oct. 28th, 1913.

CLARA MERTINKAT.,

Said motion and affidavits are endorsed as follows: Filed in open Court Nov. 5, 1913. W. H. McDonald, Clerk K. C. C.

19 Knox Circuit Court, November 6, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the plaintiff and filed affidavit and motion for the personal attendance of the witnesses Sie Banks and Cam Preston.

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE R. R. Co., Defendant.

Affidavit.

The affiant Nathan Parker, states that the witnesses Sie Banks, and Calm Preston, are non-residents of Knox County, and that the said witnesses reside in Whitley County, Kentucky. The affiant states that the said Sie Banks, and Calm Preston are important and material witnesses in his behalf, and that he cannot have a fair trial without the personal attendance of these witnesses, and an oral examination in open court, and the proper effect of their evidence cannot be had without their personal appearance in open court.

N. B. PARKER.

Subscribed and sworn to before me by Nathan Parker this 6th day of November, 1913.

R. N. JARVIS,
Examiner for Knox Co.

Endorsed: Filed in open court Nov. 6, 1913. W. H.
20 McDonald, Clerk K. C. C.

Knox Circuit Court, November 7, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the defendant and files amended answer herein.

Knox Circuit Court.

NATHAN PARKER, Adm'r of the Personal Estate of Edward Parker, Deceased, Plaintiff,
vs.
LOUISVILLE & NASHVILLE R. R. Co., Defendant.

Amended Answer.

The defendant, Louisville & Nashville Railroad Company, for amendment of its original answer herein, states the decedent, Edward Parker, received the injuries resulting in his death mentioned in the petition, by, through and because of his own negligence and carelessness, and but for his said negligence and carelessness at the time and place he received said injuries resulting in his death, he would not have received any of said injuries.

II.

The defendant, Louisville & Nashville Railroad Company, for further answer herein, states the decedent, Edward Parker, received the injuries resulting in his death mentioned in the petition, by, through and because of his own contributory negligence and carelessness, and but for his said contributory negligence and carelessness at the time and place he received said injuries resulting
21 in his death, he would not have received any of said injuries.

Wherefore Defendant prays as in its original answer, and for all other proper relief.

LOUISVILLE & NASHVILLE R. R. CO.,
By BLACK, BLACK & OWENS, *Attorneys.*

Said amended answer is endorsed as follows: Filed in open court Nov. 7, 1913. W. H. McDonald, Clerk K. C. C.

22 Knox Circuit Court, November 7, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

This cause being on submission to the Court upon motion of the defendant to take the deposition of the plaintiff and the court being advised sustains said motion and the said Parker is required to appear at the law office of Black, Black & Owens on the 7th day of this term to give said deposition.

Knox Circuit Court, November 20, 1913.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

On motion of the plaintiff a warrant of arrest is issued to Knox County and one to Whitley County for Sy Banks, a witness for the plaintiff.

23 Knox Circuit Court, January 20, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the plaintiff and offered to file amended petition herein.

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE R. R. Co., Defendant.

Amended Petition.

The plaintiff Nathan Parker, Administrator of the Estate of Edward Parker, deceased, adopts all of the allegations of his original

petition filed herein, and makes them a part hereof, as if they were fully copied herein, as stated; That the defendant Louisville & Nashville Railroad Company was at the time of the injury complained of herein, and for many years prior thereto, was a Common Carrier, by railroad, engaged in Commerce between several states. That *is* it did at all times set forth in this Amended Petition and at all times set forth in the original petition herein own and operate, a line of railroad extending through the states of Virginia, Tennessee and Kentucky, and was engaged in hauling transporting and carrying freight, goods and passengers on its said line of railroad, from the state of Kentucky, into and through the states of Virginia and Tennessee, and it was during all of the said time engaged in
24 interstate Commerce, by Railroad and as a common carrier, and that the deceased Edward Parker was at the time he received his injury and death set out in the petition, employed by the defendant company on one of its engines, on its railroad at Middlesboro, in the State of Kentucky, and the said engine upon which he was employed was used for transferring, hauling and pulling trains and cars, used by the defendant company in carrying on its business as a common carrier by railroad, in and through the said states of Kentucky, Tennessee and Virginia, and the trains and cars so moved, switched, transferred, hauled and pushed by the engine of the defendant company, upon which the decedent Edward Parker, was working at the time he was injured, were loaded with goods merchandise and other products being transported and carried, by the defendant company, into and through the said state- of Kentucky, Tennessee and Virginia, and carried from the said State- of Virginia, and Tennessee, and other states and territories, of the United States into the state of Kentucky, and said trains and cars hauled, transferred and switched, by the engine upon which the deceased was employed, were loaded with goods, merchandise and other products which were being hauled, transported and carried by the defendant Company from the state of Kentucky, into the States of Virginia, Tennessee, and other states and Territories of the United States, and that the deceased was engaged in aiding the defendant company to carry on the business of Interstate Commerce by railroad, and the engine upon which the decedent was working at the time of his death as well as the train and cars, that were setting upon the track
25 and which did not clear, and which caused the death of the decedent, were all used to carry on and promote the business of the defendant company, in the said Interstate Commerce, in carrying and transporting goods, merchandise and other articles and products of commerce from one state into other states and territories of this United States, and his decedent was injured and killed *with* the defendant was engaged in Interstate Commerce and while the said decedent was assisting the defendant company as one of its employees and servants, to carry on the said business of Interstate Commerce as a common carrier by railroad.

Plaintiff states that the said Edward Parker died within a few minutes after receiving the said injury, and as the direct and proximate result of the said injury, and he left surviving him no widow

or children, but he left surviving him, his father and mother, to-wit: Nathan Parker, and Ellen Parker, who are now living and reside in Knox County, Kentucky. That the said Father and Mother at the time of the death of the said Edward Parker, and for many years prior thereto were dependent upon the said Edward Parker, for support and they would continue to be dependent upon the said Edward Parker for support, during their natural life, and the said deceased son was contributing largely to the support of the said parents at the time he met his death, and had been so contributing to the support of the said parents for many years prior thereto. The plaintiff further states that the said beneficiaries have been and are damaged by reason of the loss of support from said son, and by reason of his society and association, in the sum of $25,000.00, and the plaintiff ought to recover said sum for and in behalf of the said bene-
26 ficiaries, and all of the said damage and loss were caused to the said beneficiaries by the negligence of the defendant company, its agents and servants in charge of its said railroad, switching yard, engine, tracks and cars, at Middlesboro, Ky., and the said Edward Parker would not have been injured or killed but for the negligence of the defendant company its agents and servants as set forth in the original petition herein.

Plaintiff states that he did not know of the facts set forth in this Amended Petition, at the time of the filing of the original petition herein, and that this Amended Petition is necessary, in order that the pleadings may conform to the facts and evidence.

Wherefore the plaintiff, prays that this Amended Petition be filed, and that he recover for and in behalf of the said Beneficiaries the sum of $25,000.00 in damages. He prays for his cost, and all proper relief.

J. M. ROBSION,
Attorney for Plaintiff.

27 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes plaintiff and files affidavit and statement for the personal attendance of witnesses.

STATE OF KENTUCKY,
County of Knox:

The affiant, J. M. Robsion says he is the attorney of record for the plaintiff, Nathan Parker, and that one C. W. Bailey, living at Middlesboro, Ky., is the agent of the Louisville & Nashville Railroad Company at said point and as affiant is informed states and believes, the said Bailey at the time and for some days prior to the killing

of the said Edward Parker, the said Bailey *and* charge of the billing, and records of the shipments and movement of the cars, on the yard at Middlesboro, and which were being hauled by the said Parker and other members of his crew; at the time and for several days prior to the time the said Parker was killed, and the said Bailey as agent, issued to said switching crew, shipping instructions, and switching instruction, directing the trains and cars to be hauled by said Parker and other members of his crew, and the said instructions so issued by the said Bailey, showed the names of the consignees, the place of destination, the names of the consignors, and the states into which said shipments were being made, and said instructions would show whether or not the said Parker was engaged in intrastate, or interstate Commerce for the defendant, and the said
28 Bailey, as affiant is informed, states and believes, now has charge of the said records, and he refused to file same. Affiant states that as attorney for the plaintiff he attempted to take the deposition of the said Bailey at Middlesboro, Ky., on January 19th, 1914 and after the said Bailey had testified that he had said records and a record of the cars which were moved and being moved by the said Parker and his switching crew on the night he was killed and for some time prior thereto, and, that the said records would show the destinations of the trains and cars being handled by the said Parker, and the said switching crew, as affiant is informed. states, and believes would show that the said Parker was engaged in Interstate Commerce at the time he was killed, and had beeen so engaged for the defendant for some time prior thereto. Affiant states that the plaintiff cannot properly present his case without the evidence of the said witness, and the said records, and at the time affiant attempted to take the said deposition the said Bailey refused, on advice from the attorney for the defendant, to testify as to the said records, or to examine said records, and state in his deposition what said records shows, and refused to produce said records.

J. M. ROBSION.

Subscribed and sworn to before me by J. M. Robsion this 20th day of January 1914.

R. N. JARVIS,
Examiner for Knox County.

Said statement and affidavit is endorsed as follows: Filed in open court Jan. 20, 1914. W. H. McDonald, K. C. C.

29 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE R. R. Co., Defendant.

Affidavit & Statement.

The affiant and plaintiff Nathan Parker, states that *prior* L. Wilson, George Tobias, O. B. Hollingsworth and Conductor W. R. Towns, C. W. Bailey who are in the employment of the defendant Louisville & Nashville Railroad Company at Middlesboro, Kentucky, are important and material witnesses for the plaintiff, and their evidence is very material and very important, and the just and proper effect of their evidence cannot be had in a reasonable degree without their personal attendance in court, that each and all of the said witnesses reside in Bell County, Kentucky and more than twenty miles from this Court.

NATHAN PARKER.

Subscribed and sworn to before me by Nathan Parker this 5th day of January, 1913.

R. N. JARVIS,
Examiner for Knox County.

The undersigned states that he is the attorney of record for the plaintiff in the above styled action, and that the evidence of the four witnesses named above is very important and material to the plaintiff herein, and the just and proper effect of their evidence cannot be had in a reasonable degree without their personal appearance in Court, and their testimony given before the jury in open court.

J. M. ROBSION,
Attorney for Plaintiff.

30 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The plaintiff, having entered his motion, to require the personal attendance of W. C. Bailey, the agent of the defendant Company at Middlesboro, Ky., to testify in behalf of the plaintiff on the trial in the above styled action in the Knox Circuit Court, and on the 22nd day of January, 1914, and having entered his motion to require the defendant, to produce the records of his office, as agent for the defendant company, for the 30th day of June, 1913, and the

29th day of June, 1913, showing the instructions and directions issued to the switching crew of which the deceased Edward Parker, was a member on both of the said dates, and the complete record of all cars hauled in the said yard, on each and both of said days showing the cars moved and switched into what trains they were placed, and showing the trains broken up by said switching crew on both of the said dates, and the names of the consignor and consignees of each car, as well as the destination of each and all of the said cars, and the point from which each and all of the said cars came, and the plaintiff having filed the affidavit of J. M. Robsion in support of the said motion and the court having considered said motion and being advised, orders the said W. C. Bailey to appear in person, in this court, on the 22nd day of January, 1914, and to bring with
him records of the defendant company, and all of the de-
31 fendant company, in the office of the said W. C. Bailey, of the movement of all trains, loaded and empty cars, handled by the switching crew of which the deceased Ed Parker was a member, moved and switched, transferred or handled, on June 29th and June 30th, 1913, together with all switching instructions in writing given to said switching crew, and bring all the record showing the billings of each and all of the said cars, the names of the consignees, the name- of the places of destination of each and all of the said cars, and to bring all records of the office of the said W. C. Bailey showing the movement of all trains, of cars of said switching crew of which the said Edward Parker, deceased, was a member, and show with what the said cars were loaded, and the place and destination of each and all of the said cars, and the starting point of each and all of the said cars, handled, switched or moved, or transferred by said switching crew of which Edward Parker was a member, on June 29th 1913, and June 30th 1913, and a copy of this order will be delivered by some sheriff, constable, marshal or policeman to the said W. C. Bailey, and W. C. Bailey is warned to fail not in any of the particulars and requirements set out in this order.

32 Knox Circuit Court, January 22, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the plaintiff and filed his affidavit in support of his motion for a warrant of arrest for Calm Preston, and the Court being advised sustains said motion. It is therefore ordered by the court that a warrant of arrest issue for Calm Preston, a witness for the plaintiff herein.

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Affidavit.

The affiant Nathan Parker, states that on- Calm Preston residing at Corbin, Kentucky, is a very important and material witness for the plaintiff in this case, and that he is now in the employment of the defendant company.

Affiant states that several days ago he took a subpœna for the said Preston, and placed it *in* the proper officer to have the said Preston summoned, but he is informed states and charges that the said Preston is dodging and is attempting to avoid coming to this court to testify for plaintiff. Affiant states that the said witness resides within twenty miles of Barbourville.

NATHAN PARKER.

33 Subscribed and sworn to before me by Nathan Parker this 22nd day of January, 1914.

R. N. JARVIS,
Examiner for Knox County.

Said Affidavit is endorsed as follows: Filed in open court, Jan. 22, 1914. W. H. McDonald, Clerk, K. C. C.

Knox Circuit Court, January 26, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

The plaintiff having offered to file amended petition and the court having considered same and being advised does not permit same to be filed, to which the plaintiff excepts.

34 Knox Circuit Court, January 26, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

By agreement of the parties all the affirmative matter contained in the 2nd paragraph of the answer is now controverted of record.

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

This cause came on for trial and the parties announced ready, then came the following jury: Calab Jones, John Warren, Sam Gambrel, Anthony Jordon, John Johnson, May Hyden, W. P. Chance, James Messer, J. L. Blair, Ellis Gambrel, Thomas Smith and Leonard Johnson, who were sworn as the law directs, the witnesses were called, sworn and sent out under the rule, the case was then stated for both plaintiff and defendant, Miss Flora Smith, this court's official stenographer was called, by defendant, to take down the testimony and the taking of the testimony was proceeded with and concluded, but being unable to complete the trial the jury was admonished by the court in the usual manner and excused until Tuesday morning January 27, 1914.

35 Knox Circuit Court, January 27, 1914.

NATHAN B. PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the defendant and offered to file 2nd amended answer which is further identified by the letter "X."

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Second Amended Answer.

For further answer herein, defendant comes now and offers this, its second amended answer at the conclusion of the evidence offered on the trial, *one* before the Court *Court* instructs the jury, in order that the pleadings may conform to the truth.

It states the death of the decedent, Edward Parker, was caused by his own negligence, recklessness and carelessness at the time and place he was killed. He was not at said time and place in his proper position on his engine, nor discharging the duties or exercising the

care for his own protection from injury which the business then being carried on by and on said engine and on which business and on which engine he was taking or to take a part by reason of his employment and his duties thereunder reasonably required
36 of him, but by reason of being asleep and otherwise careless and inattentive he suffered himself to get in an improper, exposed and dangerous position on said engine on account of which his body came in contact with a car standing on a track other than the one on which said engine was moving, and he was killed. And but for his own negligence, recknessness and carelessness he would not have been killed.

Wherefore defendant prays the court to dismiss this action, to adjudge that plaintiff take nothing by it, and that defendant have all other proper relief.

LOUISVILLE & NASHVILLE R. R. CO.,
By BLACK, BLACK & OWENS, *Attorneys.*

Said second amended answer is endorsed: Offered to be filed in open court Jan. 27, 1914. W. H. McDonald, Clerk K. C. C.

37 Knox Circuit Court, January 27, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

The defendant having offered to file 2nd amended answer herein and the court having considered same and being advised overruled same, to which defendant excepts.

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Immediately after the jury returned and read its verdict herein and before the judgment was rendered on said verdict — and presented and had filed written motion to the court to render a judgment in favor of defendant, notwithstanding the said verdict of the jury.

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

The defendant having entered motion for a judgment not-
38 withstanding the verdict of the jury, and the court considering same and being advised overruled same to which defendant excepts.

Knox Circuit Court, January 27, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Judgment.

The sworn jury came into open court and answered to the call of their names and the testimony having been so concluded, the court instructed the jury, arguments were had for both plaintiff and defendant, and the jury sent to its room for deliberation, after which they returned into court the following verdict: "We the jury agree and find for the plaintiff and allow him a damage of $7,000.00, Seven Thousand Dollars. J. L. Blair, Foreman."

It is therefore, adjudged by the court that the plaintiff, Nathan B. Parker, Adm'r, recover of the defendant, Louisville & Nashville Railroad Company the sum of $7,000 with interest thereon at the rate of 6% per annum from date until paid and the cost of this action.

39 Knox Circuit Court, January 28, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

Comes the defendant and filed motion and grounds for a new trial.

Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
v.
L. & N. RAILROAD COMPANY, Defendant.

Order.

This cause being on submission to the court upon motion and grounds for a new trial and the court having considered same and being advised overruled same, to which defendant excepts and prays an appeal to the Court of Appeals which is granted.

40 Knox Circuit Court, February 4, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

It is ordered by the court, that Miss Flora Smith, this Court's official stenographer, who took stenographically all the evidence introduced by the parties on the trial of this case, together with the ruling of the court admitting and rejecting evidence and the rulings of the court upon the evidence is hereby directed by the court to extend her notes into typewritten matter so as to make thereby a complete transcript of the evidence and rulings of the court, making a carbon copy thereof, and she will append to said transcript and the carbon copy thereof her official certificate as official stenographer, dating same and signing it by her in her official capacity. The said transcript of evidence to be forwarded with the remainder of the record in this case, to the Court of Appeals in this appeal, and the carbon copy filed with the Clerk of this court to remain in his office. And it is further ordered by the court that defendant be and it is hereby given until and including the 12th day of the coming regular April Term 1914, of this court, in which to present to this court in open court, its Bill of Exceptions and the said transcript of evidence. The Court grants until said day in the said term of court to prepare and file said bill of exceptions and transcript of
41 evidence for the reason that the present term of this court is rapidly nearing its close, and the said stenographer has not time in which to extend her said notes during the remainder of this term.

42 Knox Circuit Court, April 18, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

This day in open court, defendant, Louisville & Nashville Railroad Company *and* tendered to the court in Open court, and asked that same be filed of record, its bill of exceptions herein, which bill of exceptions includes the transcript of evidence duly certified and signed by this Court's official stenographer, Miss Flora Smith, and a carbon copy thereof certified and signed by said official stenographer, and defendant moved the court, in open court, to accept and approve said bill of exceptions, and that same be so endorsed and signed by the judge of this court who tried this case, and filed of record herein and made a part of said record. But the court directed that the clerk of this court file said bill of exceptions, together with said transcript of evidence and carbon copy thereof, and that said Clerk so endorse upon same the day and date of the filing thereof and the court takes time to examine approve and accept said Bill of Exceptions.

43 Knox Circuit Court, April Term, May 7, 1914.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
L. & N. RAILROAD COMPANY, Defendant.

Order.

The bill of exceptions herein which was tendered in open court on a former day of the present term of this court, and so endorsed, has now been read, examined, found to be correct, and allowed and signed by the Hon. F. D. Sampson, Judge of this court who presided upon the trial of this cause, and the same is ordered to be and is now filed and made part of the records herein, but not to be spread at large upon the order book. The transcript of evidence referred to and included in the said bill of exceptions which was also tendered at a former day of this court, and which was taken and made by this court's official stenographer, Miss Flora Smith, and certified to by her, has been read and examined by the said Judge and approved and signed by him, and is now filed and made part of this record herein, together with a carbon copy thereof. The original of which will be taken up with the record herein to the Court of Appeals, and carbon copy to remain on file as part of the papers and records in this case.

44 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion and Grounds for New Trial.

The defendant, Louisville and Nashville Railroad Company, hereby moves the Court to set aside the verdict of the jury, and any judgment rendered thereon against the defendant, and to grant the defendant a new trial for the following reasons and upon the following grounds.

1.

Because the court erred in the trial of this action in permitting the plaintiff to introduce and have heard by the jury over the objection of the defendant made at the time, illegal and incompetent evidence against the legal and substantial rights of defendant, and to said rulings of the Court in overruling defendant's objections, defendant at the time excepted and still accepts.

2.

Because the Court erred in the trial to the prejudice of the substantial and legal rights of the defendant in refusing to permit defendant to introduce and have heard by the jury, competent and material evidence in defendant's behalf, and to the ruling of the Court in refusing to allow defendant to introduce and have
45 heard by the jury said evidence defendant at the time excepted and yet excepts.

3.

Because the Court erred to the prejudice of the defendant's legal and substantial rights in overruling defendant's motion made at the conclusion of all the evidence of the plaintiff in chief to instruct the jury to find a verdict for defendant, and to the ruling of the Court in overruling said motion the defendant at the time excepted and yet excepts.

4.

Because the Court erred to the prejudice of the defendant legal and substantial rights in overruling defendant's motion made at the conclusion of all the evidence, to instruct the jury to find a verdict for defendant, and to that ruling of the Court defendant at the time excepted and yet excepts.

5.

Because the defendant, was, under the proof heard on the trial of this action, entitled to a judgment in its behalf, notwithstanding

the verdict of the jury, and the Court erred to the prejudice of the defendant's legal and substantial rights in overruling defendant's motion which was mad immediately after the verdict was
46 rendered, and before any judgment was rendered thereon, to render a judgment in favor of the defendant, notwithstanding said verdict, and to that action of the court defendant at the time excepted and yet excepts.

6.

Because the Court erred to the prejudice of defendant's legal and substantial rights in giving to the jury the instructions which the court gave to the jury, except the last one, and to the giving of the said instructions and to the said instructions except the last one, defendant at the time and before the instructions were read to the jury objected. But its said objection was overruled by the Court, and to that ruling of the court the defendant at the time excepted and yet excepts.

7.

Because the instructions which the court gave to the jury were erroneous, not applicable to the case as proven by the evidence, and were prejudicial to the legal and substantial rights of the defendant.

8.

Because under the evidence heard on the trial, defendant was entitled to a verdict and judgment in its behalf.

47 9.

Because the verdict of the jury is and was contrary to the evidence and to the law of the case, and not supported by the evidence heard on the trial of the case, or the law applicable to the case.

10.

Because the Court erred to the prejudice of the substantial rights of the defendant in refusing to give to the jury the instructions which the defendant presented to the Court in writing before any instructions were given to the jury, and moved the court to give them to the jury, but the court overruled said motion and refused to give any of said instructions, and to that ruling of the court the defendant at the time excepted and yet excepts.

11.

Because the cause of action proven on the trial was not pleaded, and the cause of action attempted to be pleaded by the plaintiff was not proven on the trial.

12.

Because the court erred to the prejudice of the defendant's substantial rights in overruling defendant's motion made to the court to

permit it to file the second amended answer of defendant which defendant presented to the Court in open court and moved the court to allow it to be filed and which pleading is further identified
48 by the record in this case by the letter "X". And to the action of the Court in refusing to allow said pleadings to be filed, defendant at the time excepted and yet excepts.

13.

Because if any cause of action in favor of the plaintiff against defendant was established or proven by the evidence on the trial, that cause of action was under and exclusively controlled and regulated by the provisions of a certain act of the Congress of the United States approved April 22, 1908, entitled "An Act relating to the liability of common carriers by railroad to their employes in certain cases", and commonly known as the Employers' Liability Act, and it was not under the provisions of said law that plaintiff instituted or prosecuted this action.

14.

Because the Court erred to the prejudice of the defendant's substantial rights in overruling defendant's motion filed at a former term of the court in this action asking the Court to require the plaintiff to make more definite and specific the statements of the petition in said action, in that to set out therein the omitted facts which, if they had been set out, would have shown and determined that any cause of action plaintiff ever had against defendant by reason of matters alleged, if there existed any cause of action against defendant that the provisions of the aforesaid act of Congress and not the provisions of the Kentucky Statute under which the plaintiff
49 brought and prosecuted this action exclusively controlled and regulated the proceedings for the recovery of any damage against the defendant.

15.

Because the Court erred to the prejudice of the defendant's substantial rights in permitting the attorney for plaintiff to use to the jury in the closing argument to the jury, the following language: "This case reminds me of the Wolves of the Western Country, when one is killed the others want to eat him", and to which statement defendant, by its attorney, objected at the time in open court and to the Court in the presence and hearing of said attorney for plaintiff, but which objection the Court failed and refused to pass upon, the one way or the other, thereby allowing said statement to go to and be considered by the jury as a proper statement in his argument, and to that action of the Court defendant at the time excepted and yet accepts.

16.

Because the verdict of the jury finds an amount of damage which was and is excessive, unsupported by the evidence and indicates that the jury had a bias for plaintiff and a prejudice against defendant.

Wherefore defendant prays the Court to set aside the verdict and any judgment rendered thereon, and to grant the defendant a new trial. It prays for all other proper relief herein.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY,
By BLACK, BLACK & OWENS,
Attorneys.

50 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that upon the calling of this case for trial, a jury was selected, impaneled and sworn. Thereupon the case was stated to the jury *for* the plaintiff's attorney, which statement was followed by a statement made for defendant by defendant's attorney.

Miss Flora Smith, the official stenographer of the Court, was directed to take and did take all the evidence stenographically heard on the trial by the jury.

All of the evidence introduced by either party on the trial of the said cause and heard by the jury, was taken in shorthand by Flora Smith, the official stenographer of the Court, and said testimony, together with all objections and exceptions thereto, and with all avowals, will be found in said official stenographer's transcript of the said evidence, which is hereto attached and made a part hereof as fully as if copied herein, and marked for identification "X".

Be it further remembered that at the conclusion of the plaintiff's evidence, and again at the conclusion of all the evidence, defendant moved the Court to instruct the jury to find a verdict for de-
51 fendant, but the Court overruled said motions, and refused to give said instruction, and to which action of the Court in overruling said motions, and refusing to give said instructions, defendant at the time excepted and still excepts.

The Court then on its own motion gave to the jury the following instructions, which are all the instructions given by the Court to the jury:

Gentlemen of the jury:

1.

It was the duty of the defendant, Louisville and Nashville Railroad Company, to exercise ordinary care to furnish to the plaintiff's intestate, Edward Parker, while in its employment at the time and place mentioned in the evidence, a reasonably safe place in which to perform the work required of him.

If you believe from the evidence that the defendant, Louisville and Nashville Railroad Company, failed to exercise ordinary care to pro-

vide or furnish decedent, Edward Parker, a reasonably safe place in which to perform the work required of him under his employment; or,

So negligently and carelessly operated, managed or controlled the train upon which the intestate was employed at the time as to cause it to collide or strike the caboose mentioned in the evidence, and thereby catch, injure and kill him at a time when he was in the line of duty required of him by those superior to him in authority in said work; or,

The defendant company so negligently and carelessly placed or set the caboose mentioned in the evidence on track so that the same would interfere with or prevent other cars pushed by engine
52 on which decedent was at work from entering track #1, and that by reason of the carelessness and negligence of the defendant company in either or all of said cases the decedent was caught between said car and so pushed — and the caboose and injured and killed at a time when he was exercising ordinary care for his own safety and protection; and,

You further believe from the evidence that the defendant company, its agents or officers in charge of its yards and trains at Middlesboro, superior in authority to this decedent, Edward Parker, knew or by the exercise of ordinary care could have known of the danger of said working place or of the interference of said car or of the moving of said train while the said caboose was so located and with such knowledge continued plaintiff's decedent, Edward Parker, in said work, and as a direct and proximate result of the carelessness or negligence of the defendant company said Edward Parker was injured and killed, then the law is for the plaintiff Nathan Parker, Adm'r, and you will so find.

2.

Unless you believe from the evidence as predicated in instruction No. 1 above, then your verdict must be for the defendant Louisville and Nashville Railroad Company.

3.

If your verdict is for the plaintiff, Parker's Administrator, you should find for him such a sum in damages as you may believe from the evidence will fairly and reasonably compensate the estate of Edward Parker for the destruction of his power and ability
53 to earn money, if any, not to exceed the sum of $30,000, the amount claimed in the plaintiff's petition.

4.

It was the duty of the decedent, Edward Parker, at the time and place of his injury and death to exercise ordinary care for his own safety and protection, and if you believe from the evidence that he failed to exercise such care and that by reason of his failure in this regard he was injured and killed, then the law is for the defendant company and you will so find.

5.

The words "Ordinary care" as used in these instructions mean that degree of care which an ordinarily prudent person usually exercises for his own safety and protection or for the safety and protection of another under facts and circumstances like and similar to those proven in this case.

Absence of such care is negligence.

6.

Nine or more of your number may return a verdict, but if less than twelve make a verdict, all who agree to it must sign it.

To all of the said instructions except the last one, No. 6, defendant at the time objected, but its objection was overruled, and to that ruling of the Court the defendant at the time excepted and still excepts.

54 Before the Court gave to the jury any of the aforesaid instructions, the defendant presented in typewriting to the Court the following instructions, and moved the Court to give them to the jury:

Gentlemen of the jury:

1.

It was the duty of the decedent Edward Parker to keep and maintain his proper position on the engine and to exercise ordinary care in performing his duties as fireman and in the business in which the railroad crew was engaged, to save himself from injury, and if you believe from the evidence he failed to keep or maintain his proper position on the engine or to exercise ordinary care in the performance of his duties in the business in which the said crew of which he was a member was engaged to protect himself from danger, and but for his said failure he would not have been injured, or his said failure caused or aided in causing his injury, you should find for the defendant.

2.

The court instructs the jury that the defendant company was not an insurer of Edward Parker's safety or security from danger or injury at the time and place he was injured, and the mere fact that said Parker was injured fatally at said time and place is not to be considered by you as proving that defendant was negligent at said time, or liable or blameable or responsible for said Parker's injury.

55 3.

If you shall believe from the evidence that Edward Parker was asleep on the engine at the time of his injury and said injury was caused by his being asleep at said time, or aided in bringing about his injury, and but for which he would not have been injured, or, if

you shall believe from the evidence that the said Parker knew or could have known by the exercise of ordinary care the position of the caboose in time to have avoided the injury and his failure to use ordinary care to avoid coming in contact with the caboose, caused or aided in causing, his injury, and but for which he would not have been injured you should find for the defendant company, although you may believe that defendant company or its agents and servants or any or either failed to use ordinary care to place said caboose in the clear, if said caboose was not in the clear.

But the Court overruled said motion and refused to give any of the instructions to the jury. And to that ruling of the Court the defendant at the time excepted and yet excepts.

Before the day set for the trial of this action, and before commencing to select the jury, plaintiff offered to file an amended petition alleging that the defendant was at the time of the death of the decedent engaged in interstate commerce, and decedent was at the time he received the injury resulting in his death in the service of the defendant and performing interstate labor. Said amended petition was not filed, only offered to be filed. And immediately before beginning to select the trial jury, the question came up before the Court as to whether or not the Court would allow the said amended peti-
56 tion to be filed, and then J. M. Robsion, attorney for plaintiff, stated to the Court that on investigation he had concluded plaintiff would be unable to prove the allegations of the said amended petition, and thereupon the Court overruled the motion to file the said amended petition, and it was never filed. The said amended petition is in exact words and figures as follows:

Knox Circuit Court.

NATHAN PARKER, Adm'r of the Estate of Edward Parker, Deceased, Plaintiff,
versus
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Defendant.

The plaintiff, Nathan Parker, administrator of the estate of Edward Parker, deceased, adopts all of the allegations of his original petition filed herein, and makes them a part hereof, as if they were copied fully herein, and states that the defendant Louisville and Nashville Railroad Company was at the time — the injury complained of herein, and for many years prior thereto, a common carrier by railroad, engaged in commerce between several states; that *it* it did at all times set forth in this amended petition and at all times set forth in the original petition herein, own and operate a line of railroad extending through the States of Virginia, Tennessee and Kentucky, and was engaged in hauling, transporting and carrying freight, goods and passengers on its said line of railroad from the State of Kentucky into and through the states of Virginia and Tennessee, and it was during all of said times engaged in interstate

commerce, by railroad, and as a common carrier, and that the deceased, Edward Parker, was at the time he received his injury and death set out in the petition, employed by the defendant company
on one of its engines on its railroad at Middlesboro, in the
57 State of Kentucky, and the said engine upon which he was employed was used for transferring, hauling and pulling trains and cars used by the defendant company in carrying on its business as a common carrier by railroad, in and through the said states of Kentucky, Tennessee and Virginia, and the trains and cars so moved, switched and transferred, hauled and pushed by the engine of the defendant company upon which the decedent Edward Parker was working at the time he was injured, was loaded with goods, merchandise and other products being transported and carried by the defendant company into and through the states of Kentucky, Tennessee and Virginia, and carried from said states of Virginia and Tennessee and other states and territories of the United States into the State of Kentucky, and said trains and cars transferred, hauled and switched by the engine upon which the decedent was employed were loaded with goods, merchandise and other products which were being hauled, transported and carried by the defendant company from the State of Kentucky into the States of Virginia, Tennessee and other states and territories of the United States, and that the deceased was engaged in aiding the defendant company to carry on the business of interstate commerce by railroad, and the engine upon which the decedent was working at the time of his death as well as the train and cars that were setting upon the track and which did not clear, and which caused the injury and death of the decedent, were all used to carry on and promote the business of the defendant company, in said interstate commerce in carrying and transporting goods, merchandise and other articles and products of commerce from one state into other states
and territories of the United States, and his decedent was
58 injured and killed while the defendant was engaged in interstate commerce and while the decedent was assisting the defendant company as one of its employes and servants, to carry on the said business of Interstate Commerce as a common carrier by railroad.

Plaintiff states that the said Edward Parker died within a few minutes after receiving said injury, and as the direct and proximate result of the said injury, and he left surviving him no widow or children, but he left surviving him his father and mother, to wit, Nathan Parker and Ellen Parker, who are now living and reside in Knox County, Kentucky; that the said father and mother at the time of the death of the said Parker and for many years prior thereto, were dependent upon the said Edward Parker for support and they would continue to be dependent on the said Edward Parker for support during their natural life, and the said deceased son was contributing largely to the support of the said parents at the time he met his death, and had been contributing to the support of the said parents for many years prior thereto. The plaintiff further states that the said beneficiaries have been and are damaged by rea-

son of the loss of support from said son, and by reason of his society and association in the sum of $25,000, and the plaintiff ought to recover said sum for and in behalf of the said beneficiaries, and all of the said damage and loss were caused to the said beneficiaries by the negligence of the defendant company, its agents and servants in charge of its railroad, switching yard, engine tracks and cars at Middlesboro, Ky., and the said Edward Parker would not have been killed but for the negligence of the defendant company, its agents and servants as set forth in the original petition herein.

59 Plaintiff states that he did not know of the facts set forth in this amended petition at the time of the filing of the original petition herein, and that this amended petition is necessary in order that the pleadings may conform to the facts and the evidence herein.

Wherefore the plaintiff prays that this amended petition be filed, and that he recover for and in behalf of the said beneficiaries the sum of $25,000 in damages. He prays for his costs and all proper relief.

J. M. ROBSION,
Attorney for Plaintiff.

The said amended petition has on it endorsed in these words by the Clerk of this Court:

"Offered to be filed in open Court Jan. 20, 1914. W. H. McDonald, Clerk K. C. C."

The said offered amended petition and endorsement of the Clerk are made a part of this Bill of Exceptions.

After the Court had instructed the jury as aforesaid, the case was argued to the jury by the attorney for the defendant, and then by the attorney for the plaintiff, and after the argument had been completed, the case was submitted to the jury for its verdict. Thereupon the jury returned into Court its verdict.

Immediately thereafter and within three days next thereafter, defendant presented in open Court, and the Court ordered to be filed, defendant's written motion and grounds for new trial, which are as follows:

The defendant Louisville and Nashville Railroad Company hereby moves the Court to set aside the verdict of the jury, and any judgment rendered thereon against the defendant, and to grant to defendant a new trial for the following reasons and upon the following grounds:

60 1.

Because the Court erred in the trial of this action in permitting plaintiff to introduce and have heard by the jury over the objection of the defendant made at the time, illegal and incompetent evidence against the legal and substantial rights of the defendant, and to the said rulings of the court in overruling defendant's said objections, defendant at the time excepted and yet excepts.

2.

Because the Court erred on the trial to the prejudice of the substantial and legal rights of defendant in refusing to permit defendant to introduce and have heard by the jury, competent and material evidence in the defendant's behalf, and to the ruling of the Court in refusing to allow defendant to introduce and have heard by the jury said evidence, defendant at the time excepted and yet excepts.

3.

Because the Court erred to the prejudice of defendant's legal and substantial rights in overruling defendant's motion made at the conclusion of all the evidence of the plaintiff in chief to instruct the jury to find a verdict for the defendant, and to the ruling of the Court in overruling said motion defendant at the time excepted and yet excepts.

4.

Because the Court erred to the prejudice of the defendant's legal and substantial rights in overruling defendant's motion made at the conclusion of all of the evidence, to instruct the jury to find a verdict for defendant, and to that ruling of the Court defendant at the time excepted and yet excepts.

61

5.

Because the defendant was under the proof heard on the trial of this action, entitled to a judgment in its behalf, notwithstanding the verdict of the jury and the Court erred to the prejudice of defendant's legal and substantial rights in overruling defendant's motion which was made immediately after the verdict was rendered, and before any judgment was rendered thereon, to render a judgment in favor of the defendant, notwithstanding the verdict, and to that action of the Court the defendant at the time excepted and yet excepts.

6.

Because the Court erred to the prejudice of the defendant's legal and substantial rights in giving to the jury the instructions which the Court gave to the jury, except the last one, and to the giving of the said instructions and to said instructions except the last one, defendants at the time and before the instructions were read to the jury, objected. But its said objection was overruled by the Court, and to that ruling of the Court defendant at the time excepted and still excepts.

7.

Because the instructions which the Court gave to the Jury were erroneous, not applicable to the case as proven by the evidence and were prejudicial to the legal and substantial rights of the defendant.

8.

Because under the evidence heard on the trial, defendant was entitled to a verdict and judgment in its behalf.

62 9.

Because the verdict of the jury is and was contrary to the evidence and to the law of the case, and not supported by the evidence heard on the trial, or the law applicable to the case.

10.

Because the Court erred to the prejudice of the substantial rights of the defendant in refusing to give to the jury the instructions which the defendant presented to the Court in writing before any instructions were given to the jury, and moved the Court to give them to the jury, but the Court overruled said motion, and refused to give any of said instructions, and to that ruling of the Court the defendant at the time excepted and yet excepts.

11.

Because the cause of action proven on the trial was not pleaded, and the cause of action attempted to be pleaded was not proven on the trial.

12.

Because the Court erred to the prejudice of the defendant's substantial rights in overruling defendant's motion made to the Court to permit it to file the second amended answer of the defendant which defendant presented to the Court in open Court, and moved the Court to allow it to be filed, and which pleading is further identified in the case by the letter "X," and to the action of the Court in refusing to allow said pleading to be filed, defendant at the time excepted and yet excepts.

63 13.

Because if any cause of action in favor of the plaintiff against the defendant was established or proven by the evidence on the trial, that cause of action was under and exclusively controlled and regulated by the provisions of a certain act of the Congress of the United States, approved April 22, 1908, entitled "An Act relating to the liability of Common Carriers by railroad to their employees in certain cases" and commonly known as the Employers' Liability Act, and it was not under the provisions of said law that plaintiff instituted or prosecuted this action.

14.

Because the Court erred to the prejudice of the defendant's substantial rights in overruling defendant's motion filed at a former term of the Court in this action, asking the Court to require plain-

tiff to make more definite and specific the statements of the petition in said action, in that to set out therein the omitted facts which, if they had been set out, would have shown and determined that any cause of action the plaintiff ever had against the defendant by reason of any of the matters alleged, if there existed any cause of action against the defendant, that the provisions of the aforesaid act of Congress and not the provisions of the Kentucky Statutes, under which plaintiff brought and prosecuted this action, exclusively controlled and regulated the proceedings for the recovery of any damages against the defendant.

15.

Because the Court erred to the prejudice of the substantial rights of the defendant in permitting the attorney for the plaintiff to use to the jury in the closing argument to the jury, the following language, "This case reminds me of the wolves of the Western country. When one is killed, the others want to eat him," and to
64 which statement defendant by its attorneys at the time objected in open court in the presence and hearing of the said attorney for plaintiff, but which objection the Court failed and refused to pass on, the one way or the other, thereby allowing the said statements to go to and be considered by the jury as a proper statement in his argument, and to that action of the Court defendant at the time excepted and yet excepts.

16.

Because the verdict of the jury finds an amount of damage which is and was excessive, and unsupported by the evidence, and indicates that the jury had bias for plaintiff and a prejudice against the defendant.

Wherefore defendant prays the Court to set aside said verdict and any judgment rendered thereon, and to grant the defendant a new trial. It prays for all other proper relief hereon.

But the Court overruled said motion and grounds for new trial, and refused to grant the defendant a new trial, to which ruling of the Court the defendant at the time excepted and still excepts and prayed an appeal to the Court of Appeals, which was granted.

Came the defendant Louisville and Nashville Railroad Company and tendered this its Bill of Exceptions, with a transcript in duplicate of the official stenographic report of the evidence, and, on its motion, said bill of exceptions is examined, signed attested and approved by the Judge, and it is now ordered that they be filed and be made a part of the record without being spread on the
65 order book; and it is now certified that this Bill of Exceptions with the said stenographic report of evidence, contains all the evidence in this case, and is true and correct in every particular.

Examined, approved and allowed by the Court this May 9, 1914.

F. D. DAMPSON,
Judge Knox Circuit Court.

66 STATE OF KENTUCKY,
County of Knox, ss:

I, W. H. McDonald, Clerk of the Circuit Court in and for the County and State aforesaid, do certify that the above and foregoing is a true and complete and correct copy of the Orders, pleadings, exhibits had in and about the trial of the case of Nathan Parker, adm'r, against the Louisville and Nashville Railroad Company, as appears of record in my office.

Given under my hand as Clerk of said Court this 29th day of June, 1914.

W. H. McDONALD,
Clerk Knox Circuit Court.

67 Citizens Trust & Guarante- Company of West Virginia, a Corporation, organized under the laws of the State of West Virginia with its principle Office at Parkersburg, West Virginia and duly licensed and authorized to become surety on bonds within the Commonwealth of Kentucky, hereby makes constitutes and appoints James D. Black or H. H. Owens, of Barbourville, Kentucky, its true and lawful attorney for it and in its name to sign, seal and deliver a certain supersedeas bond for the Louisville and Nashville Railroad Company, to be given in the Knox Circuit Court in the name of Edward Parkers Administrator vs. Louisville and Nashville Railroad Company hereby ratifying and confirming all and singular all of the action of the said attorney-in-fact in and about the execution and delivery of said bond, to all intents and purposes the same as if said bond had been executed by the proper officers of the said guarantee Company at its home office. This power of attorney to be attached to or filed with said bond when so executed.

In Testimony Whereof, the said Guarantee Company has caused its corporate name to be signed hereto, and its corporate seal to be affixed hereto and attested, by its proper officers thereunto duly authorized, this 2 day of February, 1914.

CITIZENS GUARANTEE AND TRUST COMPANY
OF WEST VIRGINIA,
By W. G. PETERKIN, *President.*

Attest:
J. H. KNAPP, *Secretary.*

STATE OF WEST VIRGINIA,
Wood County, To wit:

I, J. L. Knapp, a Notary Public, in and for said County do certify that W. G. Peterkin personally appeared before me in my said County, and being by me duly sworn, did depose and say that he is the president of the Citizens Trust and Guarantee Company, of West Virginia, the corporation described in the writing above
68 bearing date the second day of February, 1914, authorized by said corporation to execute and acknowledge deeds and

other writings of said corporations, and that the seal affixed to said writing is the corporate seal of said corporation and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said W. G. Peterkin acknowledged the said writing to be the act and deed of said corporation.

Given under my hand and official seal this the second day of February, 1914.

[SEAL.] (Signed) J. L. KNAPP,
Notary Public.

My commission expires August 29, 1917.

69 *Supersedeas Bond.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
against
EDWARD PARKER'S ADM'R, Appellee.

Upon an Appeal from Judgment of the Knox Circuit Court, Rendered 27th Day of January, 1914.

Whereas, said appellant, L. & N. R. R. Co., prays an appeal from the judgment of Seven Thousand Dollars rendered on the 27th day of January, 1914, against L. & N. R. R. Co. in favor of the Appellee for the sum of $7,000.00 and the Appellant desires to Supersede the said Judgment above mentioned;

Now, we, Citizens Trust and Guarantee Company, surety, does hereby covenant to and with the Appellee, Nathan Parker, Admr. of the estate of Edward Parker, that the Appellant will pay to the Appellee all costs and damages that may be adjudged against the Appellant on the Appeal, and also that they will satisfy and perform the judgment above stated, in case it shall be affirmed, and any judgment or order which the Kentucky Court of Appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the judgment aforesaid.

Witness our hands this 20th day of February, 1914.

CITIZENS TRUST AND GUARANTEE
COMPANY OF WEST VIRGINIA,
By HIRAM H. OWENS, *Attorney in Fact.*

Supersedeas and Copy issued, February 20, 1914.

W. H. McDONALD, *Clerk K. C. C.*

70 At the same time, to-wit, July 25, 1914, the appellant filed with the foregoing transcript a transcript of the evidence, which is in words and figures following, to-wit:

71 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Evidence.

This cause came on for trial at the January term, 1914, of the Knox Circuit Court, on January 23rd, 1914, before Judge F. D. Sampson and a jury.

The plaintiff to sustain his issues, introduced the following testimony, to-wit:

NATHAN PARKER, being duly sworn as a witness for the plaintiff, testified as follows:

Direct examination.

By J. M. Robsion:

Q. Where do you live?
A. About a mile and a half of Grays Station.
Q. How old are you?
A. Fifty-five years old.
Q. Did you know Ed Parker in his lifetime?
A. Yes sir.
Q. What relation was he to you?
A. My son.
Q. How old was he at the time he was killed?
A. I reckon he would have been twenty-four years old in December if I am not mistaken, about the 19th of December.
Q. You say he would have been 24 years old in December, 1913?
A. Yes, sir.
72 Q. What time did he meet his death?
A. 30th, the last night of June.
Q. 30th day of June, 1913?
A. Yes, sir, the 30th, night.
Q. For whom was your son working at the time he was killed?
A. For the Louisville & Nashville Company.
Q. In what capacity?
A. Firing an engine.
Q. At what place?
A. Middlesboro.
Q. That on the regular line of road that it occurred?
A. On the yards I suppose.
Q. The switch yard?
A. Yes, sir.
Q. When did you see your son after he was killed?
A. I never saw him until they brought him to Grays.
Q. When was that?

A. They brought him the next morning after he was killed, come there at 11 o'clock with him.
Q. Did you see any injury on him anywhere?
A. I saw a place on his neck where it was cut.
Q. Did you notice the other part of his body?
A. I never saw any clothes off; I saw his hands and face; his face was skinned a little scar in here on his neck (indicating).
Q. After that did you see the caboose or car or engine in which he was on?
A. I saw the one they said killed him; I saw the caboose and engine both they said he was on.

Defendant objects to hearsays of the witness.
By the Court: "Do not tell what anybody said."

73 Q. Where was the caboose?

Defendant objects; sustained; plaintiff excepts.

Q. Did you see the caboose that did that injury?

Defendant objects; overruled; defendant excepts.

A. I saw the one they said was it.
Q. Where did you see the caboose you are speaking of?

Defendant objects; overruled; defendant excepts.

A. Greys station.
Q. When?

Defendant objects; overruled; defendant excepts.

A. It was about three days after he was buried.
Q. What did you see on the caboose that you did see?

Defendant objects; sustained; plaintiff excepts.

Q. The engine, where did you see the engine?
A. At Grays.
Q. What was the number of the engine you saw?

Defendant objects; overruled; defendant excepts.

A. 909.
Q. What did you see on that engine, if anything?

Defendant objects; sustained; plaintiff excepts.

Q. What was the condition of your son as to health before and at the time he was killed?
A. He was stout and hearty I reckon.
Q. What size man was he?
A. He weighed 167 I think it was.
Q. I want you to state or describe whether or not he was a muscular stout young man or to the contrary?

74 Defendant objects; overruled; defendant excepts.

A. Yes, sir, he was a stout muscled man.
Q. How regular did he work, if he worked at all?
A. He worked all the time.

Q. What wages were he earning at the time he was killed?
A. I do not know exactly what the wages was; I do not know what they paid him.
Q. What was the wages he was earning at that time?

Defendant objects; overruled; defendant excepts.

A. He said he was getting $2.46 a shift.
Q. What do you know about the wages he had been earning at that time and for some time before that?

Defendant objects; overruled; defendant excepts.

A. He had made as high as $3.00 and $3.50 a day, and he has worked for less.

Cross-examination.

J. D. Black:

Q. Were you present at the time your son was injured and killed?
A. No sir, I was not.
Q. I take it you were at your home near Grays, at that time?
A. No, sir, I was at Corbin.
Q. That is some 50 miles or further from Middlesboro?
A. I do not know how far it is; though I was at work on a house and they sent me a telegram, and I got it at half after 11.
Q. Do you know of your own knowledge what wages your son was getting under the employment he was in at the time he was killed?
75 A. No sir, not from my own knowledge; just what he said.
Q. Do you know of your own knowledge?
A. No.
Q. You spoke a while ago about that he had got something like $3.00 a day; when was that?
A. He was working at Eagon, Tennessee, running an electric drill for a Coal Company.
Q. That was while he was in the coal mining business?
A. (No answer.)
Q. In that business he had got a good deal less than that?
A. Yes, sir, he had worked for less than that.
Q. About how long had he been working as fireman on the engine at Middlesboro, if you know?
A. I do not know how long he had worked up there, exactly.
Q. Your recollection is that he came to his death on the night of the 30th day of June, 1913?
A. Yes sir.
Q. And at that time he was about 24 years of age?
A. About 24 years old.

PETER SCALF, being duly sworn as a witness for the defendant, testified as follows:

Direct examination.

J. M. Robsion:

Q. Where do you live?
A. Corbin.
Q. In what business are you engaged?
A. Working for the Louisville & Nashville Railroad Company.
Q. What do you do?
A. Car inspect-.
76 Q. What connection did you have with the Louisville & Nashville Railroad Company on June 30th, 1913, and up to the present time?
A. Working for them.
Q. In what capacity?
A. Car inspecting in the yards.
Q. At what place?
A. Corbin.
Q. Did you ever learn of Ed Parker being killed at Middlesboro on the yards?
A. Nothing more than I heard of it.
Q. Did you have information of that?
A. Yes, sir.
Q. After that time, as car inspector did you see any engine or caboose that was on the Middlesboro yards at the time he was killed?

Defendants objects; overruled; defendant excepts.

A. I could not say.
Q. As car inspector, did you inspect any caboose that had been on the yards at Middlesboro?

Defendant objects; overruled; defendant excepts.

A. I could not say.
Q. Were you directed to look after or inspect any caboose?

Defendant objects; overruled; defendant excepts.

A. I could not say.
Q. Were you directed to look after or inspect any caboose?

Defendant objects; overruled; defendant excepts.

A. I was not.
Q. Did you see a caboose down there that was injured in any way on the yards at Corbin?

Defendant objects; overruled; defendant excepts.

A. I could not say.
Q. Did you have any information from any of the railroad company's servants and agents or see a caboose that you had information was the caboose on which Parker was injured?

Defendant objects; overruled; defendant excepts.

A. Well I seen a caboose what they said he was injured on.
Q. What caboose was that?

Defendant objects; overruled; defendant excepts.

A. I do not remember the number.
77 Q. What company did it belong to?
A. The L. & N. Railroad Company.
Q. And what had the caboose been used on in coming to Corbin, on what kind of a train?

Defendant objects; overruled; defendant excepts.

A. Well, I do not hardly remember; I could not state positively to that question, to what train, but my recollection it was on train 86.
Q. What kind of train is that?
A. Local.
Q. Between what points?
A. Middlesboro and Corbin.
Q. Have you now a record as to when that train was brought from Middlesboro to Corbin.

Defendant objects; overruled; defendant excepts.

A. No, sir, I have not got no certain day or date.
Q. When was that caboose brought to Corbin on local #86 with reference to the time Parker is said to have been killed?

Defendant objects; overruled; defendant excepts.

A. I could not say.
Q. What did you observe about this caboose'- condition?

Defendant objects; overruled; defendant excepts.

A. I never shopped it.
Q. I want to know if it was injured in any way?

Defendant objects; overruled; defendant excepts.

A. All the cars, Mr. Robsion, is more liable to have to be injured.
Q. I understand that, but tell the jury what that injury was on that one?

Defendant objects; overruled; defendant excepts.

A. On that night?
Q. Yes, sir.

Defendant objects; overruled; defendant excepts.

78 A. I do not remember.
Q. You saw the caboose didn't you?
A. What night do you have reference to?
Q. When you saw it at Corbin and after you heard Parker was injured and had information he was injured on that caboose?

Defendant objects; overruled; defendant excepts.

A. It had some little scun places on the corner of it, I believe is my recollection.

Q. Which corner do you mean, the front or back end of it?

Defendant objects; overruled; defendant excepts.

A. It is what I call the rear end.
Q. That's the back end?
A. Yes, sir.
Q. Describe to the jury this little skinned place that you saw?

Defendant objects; overruled; defendant excepts.

A. Something like it shows beyond the paint.
Q. Do you mean the side of it was scraped?

Defendant objects; overruled; defendant excepts.

A. No, sir, the corner.
Q. Describe what you saw?

Defendant objects; overruled; defendant excepts.

A. It was the corner of the caboose like that (indicating by the Reporter's desk), and there was some little spots on the corner of the caboose like that would be knocked off—the paint—; something like door has paint—the paint which the car was painted with—it showed new.

79 Q. Is there such a thing on the rear of the caboose that you call the marker?
A. Do you mean a marker bracket?
Q. Yes, sir?
A. Yes, sir.
Q. Tell the jury where the marker bracket was on that caboose on the same side where you say the paint was knocked off?

Defendant objects; overruled; defendant excepts.

A. It was missing.
Q. Describe the condition of the place where the marker was?
A. On the corner of the caboose—You see this is the body of the caboose coming up (indicating by stenographer's desk), and it was up something like to this (indicating) we call them on the corner of the caboose,—on top of the corner of the roof (indicating) just under it.
Q. Tell the jury whether or not it was there or torn off?

Defendant objects; overruled; defendant excepts.

A. This one was off where I have reference to; this is on the east side,—north end of the yard—I do not know whether you call it north or south end of the division.
Q. What was the condition of the place where the marker was off? What indications was there as to violence upon that part of the caboose?

Defendant objects; overruled; defendant excepts.

A. I do not remember; simply the bracket was just knocked off or dropped off or torn off; I do not know — come it off.

80 Q. Did you see any flesh or blood on the caboose?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, seen blood.
Q. Where was it?
A. It was down below where the bracket should have been. Something near the top of the window of the caboose—beneath of where the bracket should have been.
Q. Mr. Scalf, assuming that the train was standing on the yard at Middlesboro with the caboose headed toward Corbin and the rear end toward the station of Middlesboro, on which side of that rear end of the car or caboose was the marker torn off and bruised on the side, looking this way?

Defendant objects; overruled; defendant excepts.

A. You mean parallel with the main line headed toward Corbin?
A. Yes, sir.
A. I can hardly place that how that should be; I am not acquainted with Middlesboro.
Q. Well, put the car on the main line, at Middlesboro, and the rear next to the depot and front of it toward Corbin, on which side of the rear end of that caboose was this marker and where the marked piece showing where the marker was torn off and where the blood was?

Defendant objects; overruled; defendant excepts.

A. It ought to be on the east side of the yards in Corbin when it arrived in Corbin.
Q. Would it be on the right or left side of the caboose standing on the main line of Middlesboro and facing toward Corbin with the rear toward Middlesboro and you standing behind it?

Defendant objects; overruled; defendant excepts.

81 A. I could not hardly say, but I believe on the left.
Q. Did you ever see engine 909?
A. Oh, I have seen so many of them I do not remember.
Q. Have you seen that?
A. I could not say,—I might and I might not.
Q. Did you see an engine that Mr. Parker was on at the time he was killed and did you have information from the Railroad Company's agents and servants, at Corbin, after you learned Parker was killed that it was the engine upon which he was at the time he was killed? See it at Corbin or anywhere else?

Defendant objects; overruled; defendant excepts.

A. I did not see the engine when it come;
Q. Did you see an engine at Corbin soon after Parker was killed with the lights broken out and blood on the engine?

Defendant objects; overruled; defendant excepts.

A. Well, I do not understand that question.
Q. Did you see an engine in that condition about the time you saw this caboose that you have described?

Defendant objects; overruled; defendant excepts.

A. No, sir.
Q. Do you do anything for the Railroad Company now?
A. Car inspector.
Q. And did you examine this caboose as car inspector for the Railroad Company.
A. Yes, sir.

82 Cross-examination.

J. D. Black:

Q. What is the distance Mr. Scalf, from Corbin, Kentucky to Middlesboro?
A. I do not remember.
Q. About the distance?
A. 40 miles I guess.
Q. Do you know where the caboose, about which you have been asked by the attorney for plaintiff, came from when you saw it? Where it had been or anything like that?
A. I do not know where it had been.
Q. Do you know anything about what caused the scraping of the paint or anything that you saw about it?
A. No, sir.
Q. What caused that?
A. No sir.
Q. I believe you stated to the jury that you disremember when it was you saw that particular caboose?
A. No, sir, I do not remember the date; I do not know as I could give the month.
Q. There are a great many cabooses coming into the yards at Corbin, are there not?
A. Oh, yes sir.
Q. About how many do you think come in there and go out there on an average in each 24 hours?
A. I could not say.
Q. Could you give some idea about that?
A. No, I could not for this reason,—sometimes we will shop two or three cabooses in the run of a night and maybe put in windows and maybe put on marker brackets and we will fix up locks and different things.

83 Q. Corbin is the end of division?
A. The terminal, yes, sir.
Q. How many divisions of the railroad go into Corbin, Ky.?
A. Four.
Q. What are they?
A. L. B., K. C., C. V. and K. D.
Q. And cabooses run on all these lines and divisions?
A. Yes, sir.
Q. And come into Corbin from these divisions and go out of Corbin on these divisions?
A. Yes, sir.

Redirect examination:

Q. But you do know this caboose was brought to Corbin on the local freight train from Middlesboro to Corbin and on Number 86 freight train?

A. I do not know as it come from Middlesboro but I know this run is usual as I understand.

Recross-examination:

Q. That portion of the road from Middlesboro to Corbin is part of the Cumberland Valley division?

A. Yes, sir.

Q. And that same division extended beyond Middlesboro into the state of Virginia?

A. Yes, sir.

Q. And freight train cabooses and freight trains themselves go over that entire division from Norton to Corbin and from Corbin to Norton?

A. That is my understanding always.

Redirect examination:

Q. This local freight # 85 don't run to Norton does it?

A. My understanding it runs to Middlesboro.

84 Q. And is not Middlesboro the end of the freight division of the L. & N.?

A. I am not very much acquainted to say.

Q. Didn't you say at the time Parker was killed and before that time that this local freight No. 86 runs from Corbin to Middlesboro and no further and return?

A. That is my understanding, yes sir; I am informed.

Recross-examination:

Q. Is it not also your understanding that while there is a freight train running between those two points—Norton and Corbin—that that freight train frequently picks up cars and cabooses which have come from Norton, Virginia, to Middlesboro?

A. Oh, yes, that is my understanding; we call them through trains.

Scy Banks, being duly sworn as a witness for the plaintiff, testified as follows:

Direct examination.

By J. M. Robsion:

Q. Where do you live?

A. I live at Place.

Q. In what business are you engaged?

A. Working for the Railroad Company.

Q. Which railroad?

A. L. & N. Railroad Company.
Q. Where do you work?
A. In Corbin yards.
Q. What do you work at?
A. I work with the car repairs.
Q. Where were you working on June 30th, 1913?
85 A. In Corbin yards.
Q. What doing?
A. I was oiling cars.
Q. Did you know Ed Parker?
A. Yes, sir.
Q. Did you have any information about him being killed?
A. I did sometime that night; yes, sir.
Q. Where were you when you got that information?
A. I was at work.
Q. In what capacity? What were you doing?
A. Oiling cars.
Q. In the yards at Corbin?
A. Yes, sir.
Q. For the L. & N. Railroad Company?
A. Yes, sir.
Q. While you were on the yards in the employment of the Company did you get any information from any of the agents and workmen for the company there about the caboose or engine on which Parker was killed?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, I did.
Q. What was the number of the engine?

Defendant objects; overruled; defendant excepts.

A. I do not know nothing about the engine.
Q. What kind of a caboose was it?

Defendant objects; overruled; defendant excepts.

A. The best of my knowledge it was a box car carboose; caboose that had been made out of a box car,—I am not certain about it.
Q. Where did you see this caboose?
A. In the Corbin yards.
Q. On what train had it been used?
A. I do not know what train it come in there on; it was
86 on the caboose track when I saw it.
Q. What injuries, if any, were on this caboose?

Defendant objects; overruled; defendant excepts.

A. There was a marker hanger broke off of it.
Q. Where is the marker hanger on a caboose?
A. Hangs on the corner.
Q. Front or rear of the caboose?
A. This was on the rear of the caboose where it was setting at that time; they are on both ends of it.

Q. The place where this was knocked off was at the rear of the caboose?

A. Where it was setting when I saw it, it was.

Q. What other marks, if any, did you see on the caboose?

Defendant objects; overruled; defendant excepts.

A. There was some scratches on the side of the caboose; rubbed places, scraped up on the side of the caboose.

Q. You mean along the side of the caboose?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.

Q. Where were these ragged, scratched places with reference to the side of the caboose that the hanger was torn off?

Defendant objects; overruled; defendants excepts.

A. They were below.

Q. What I am trying to get,—were they on the side the marker was torn off or on the opposite side?

A. Opposite side.

87 Q. Let this desk here (indicating to Reporter's desk) along here represent the side of the caboose, and this the rear end next to me; where were the markers?

Defendant objects; overruled; defendant excepts.

A. They fit on the corner like that (indicating on the desk) and stuck behind the caboose.

Q. Stuck behind the caboose?

A. Yes, sir, fastened on a piece short like that, (indicating) and stuck out that far back.

Q. These markers?

A. Yes, sir, the marker hangers.

Q. The marker hanger stuck out two inches or more from the rear end of the caboose?

A. Yes, sir.

Q. What is the purpose of those markers?

A. They are to carry signals in, a little green or red light.

Q. When the caboose is moving in service is that where they hang the lights?

A. Yes where they hang the lights, the red lights.

Q. If I understand you this marked place was along the side?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.

Q. How far along the caboose was the marked place?

A. I could not tell; I never measured to tell how long it was.

88 Q. Describe that marked or scarred place along the side of the caboose?

Defendant objects; overruled; defendant excepts.

A. I do not know as I can; it is just a scraped up place across the caboose is all I can describe to you.

Q. Did you see anything else along that place on the caboose where the marker was torn off or where this schatched or marked place was along the side of the caboose? Did you see anything else along there?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, I saw some blood.

Q. Where was the blood?

A. Along all down the side of the caboose.

Q. How far along the caboose did the blood extend?

A. It did not go far.

Q. How far did it extend with reference to the window of the caboose?

Defendant objects; overruled; defendant excepts.

A. Along out to the window.

Q. What, if anything, did you see in the way of blood or flesh about where the marker was torn off?

Defendant objects; overruled; defendant excepts.

A. I do not remember whether I saw anything or not.

Q. What kind of a caboose was this?

Defendant objects; overruled; defendant excepts.

A. I told you a while ago; I don't remember but the best of my knowledge it was a caboose made out of a box car; I am not certain that is the kind.

Q. Do you know on what train this caboose was used?

A. No, sir, I did not pay any attention to what train the cabooses were used on.

89 Q. At that time were you car repairer of car oiler?

A. I was a car oiler at that time, but I done anything they wanted done and called on me to do.

Q. How did you happen to see this caboose and marker torn off and blood on it?

Defendant objects; overruled; defendant excepts.

A. I was told by Pete Scalf.

Defendant objects; sustained.

Q. Who was the person in charge of your work that directed your work at that time?

Defendant objects; overruled; defendant excepts.

A. Bill Reed.

Q. Do you know Peter Scalf?

A. Yes, sir.

Q. What connection did he have with the Railroad at that time?

A. Car inspector.

Q. Tell the jury whether or not Mr. Scalf pointed this car out to you, the car inspector?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, he told me about getting a marker hanger and putting on the caboose.

Q. Did you see the engine on which Mr. Parker is said to have been injured?

A. No, sir, did not see it at all.

Q. How soon was that after you had information that night that Mr. Parker was killed?

A. That was before; I had never saw anything about it at all after I had the caboose fixed.

Q. From whom did you get that information that that was the caboose upon which Mr. Parker was killed?

Defendant objects; overruled; defendant excepts.

A. The best of my knowledge uncle Pete Scalf told me——

90 Q. That the same man who fixed the caboose?

A. The same man,—along in the night after the caboose was fixed.

Cross-examination.

J. D. Black:

Q. I take it from what you have described, that you were not present at the time young Mr. Parker was killed?

A. No, sir, I was not.

Q. And know nothing about the circumstances of his killing?

A. No, sir.

Q. And I understand also that the caboose which you have spoken about was repaired by you before you even got information that Mr. Parker had been killed?

A. Yes, sir.

Q. And you got information he was killed on the same night he was killed?

A. I do not remember whether it was the same night; it was on the night we fixed the caboose I heard he was killed.

Q. And the information that he was killed came to you after you worked on the caboose?

A. Yes, sir.

Q. You do not know where that caboose had been?

A. No, sir.

Q. Or from what point it had come?

A. No, sir.

Q. I have understood and ask you if that is the fact, at Corbin at the time you saw this particular caboose, is there only one or more divisions of the L. & N. Railroad Company there?

A. Yes, sir, there are three divisions of the L. & N. that come in there.

91 Q. And all of these divisions carry freight trains and cabooses that belong to the different freight trains?

A. Yes, sir.
Q. Just what caused the marker to have been torn or knocked off of this particular caboose you do not know?
A. No, sir, I do not know what caused it to be off nor where it happened before.
Q. Nor where happened anything that you saw about that caboose?
A. No, sir.

SAM PARKER, being duly sworn as a witness for the plaintiff, testified as follows:

Direct examination.

J. M. Robsion:

Q. How old are you?
A. 29 years old.
Q. What relation are you to Ed Parker?
A. Brother.
Q. Did you see your brother Ed after he was killed?
A. Yes, sir.
Q. Where was he?
A. The first time I saw him he was at Middlesboro.
Q. When was that with reference to the time he was killed?
A. It was the next morning after he was killed the night before,—July 1st.
Q. Where was he at the time you saw him?
A. At the Undertaker's office; they had charge of him.
Q. Do you know where is located the yards of Middlesboro the railroad yards of the defendant company, where your brother was killed, the switch yard?
92 A. Yes, sir, I have seen them; I am not acquainted with them.
Q. Did you go upon the yards that day or that morning after you went there after your brother was killed?
A. Yes, sir.
Q. Did you see the engine or caboose in the yard or have any information that they were the engine and caboose that caused his death?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.
Q. Where was the engine?
A. The engine was over on the yard a little over to the right of where he was killed.
Q. Where was the caboose?
A. Standing nearby where they said they had taken it out of the engine.
Q. Who, if anyone, pointed out the engine and caboose to you?
A. Jack Lumpkins.

At this point, the defendant moved the court to exclude the answer from the consideration of the jury; sustained.

Q. What connection did Jack Lumpkins have with the Railroad Company?

A. He was fireman.

Q. On the yard there at Middlesboro?

A. Yes, sir, at least they said he was.

Q. What was the number of the engine you saw there that was pointed out to you?

Defendant objects; overruled; defendant excepts.

A. #909.

93 Q. What did you see there with reference to the condition of the engine that was pointed out to you, this engine 909?

Defendant objects; overruled; defendant excepts.

A. There was blood all down in the engine where they had taken him out of the cab; also on the side of the window where he was killed.

Q. What, if anything, is there on the engine and about the cab in the way of window or doors?

A. There are two windows I think right together;—I think a sash between them.

Q. Do you know on which side of the engine the fireman works?

A. They are supposed to be on the left side I think.

Q. What was the condition of the windows on the left side of that engine?

Defendant objects; overruled; defendant excepts.

A. The window—one of them was broke out; I do not remember whether one or both.

Q. What do you mean by "broke out"?

A. The lights.

Q. You mean the glass?

A. Yes, sir.

Q. What, if anything, was in the way of blood or flesh on that window?

Defendant objects; overruled; defendant excepts.

A. There was blood on it and on the sashes by it.

94 Q. Describe the condition of the caboose that was there and pointed out to you by Lumpkins as one on which Parker was killed?

Defendant objects; overruled; defendant excepts.

A. There was blood on it, and a piece of flesh on it, upon the corner there was flesh there and, *and* that stave that holds the block it was broken off.

Q. What other marks were there on the caboose?

Defendant objects; overruled; defendant excepts.

A. There was blood from the corner of the caboose out over the window in the caboose where it was looked to have run or rubbed him against the side of the caboose.

Cross-examination.

J. D. Black:

Q. Where were you, if you know, when your brother came to his death?
A. At home.
Q. Where do you live?
A. Down near Grays.
Q. And you went up, of course, to Middlesboro, after you received information that your brother was killed?
A. Yes, sir.
Q. All you know about that being the engine on which your brother was at the time he was killed, you got from information?
A. Yes, sir.
Q. You spoke about there having been two windows on the side of that engine; now how were those windows located, were they on the side, or one of them on the side and the other in front
95 of where the fireman has a place to sit?
A. They were side by side, a sash up between them.
Q. Both of those windows were on the side in the cab?
A. Yes, sir.
Q. And separated by a wooden sash?
A. Yes, sir.
Q. You say that in one of them that one of the glasses had been broken?
A. Yes, sir.
Q. Which one of the windows had the broken glass in it?
A. It was the one toward the engine,—fartherest one.
Q. Did you notice in the cab the seat where the car man sits when he is sitting in his cab?
A. No, sir.
Q. Did you notice that?
A. No, sir.
Q. Did you notice that whether that was next to the broken window or the other?
A. No, sir, I did not go up in the cab.
Q. You spoke of having seen blood on the side of the cab?
A. Yes, sir.
Q. Was that in the inside or outside?
A. Outside and also on the inside, where you get up in the cab.
Q. How far away was that blood on the outside of the cab from these windows that you have spoken of?
A. It was right down under the sash; right down under the window.
Q. Under the window?
A. Yes, sir, and also on the sash.
96 Q. Was the blood you spoke of being on the outside and under the window on the wood?
A. Yes, sir, on the wood.
Q. How far below the lower part of the window was that blood?

A. It had run down; I do not know how far down, but run down from the window.

Q. You spoke of seeing blood on the sashes—the sash of each one of those windows, or do you mean the sash that was between those two windows where you saw the blood?

A. Yes, sir.

Q. The glass in the window you say to the rear end—that sash was not broken?

A. The first window where he gets up that you come to?

Q. Yes, sir.

A. I do not remember whether it was broken or not; it was open if it was not broken out; the other was broken out.

Q. The window that was nearest to the front end of the engine or cab was the one you noticed that had the broken glass in?

A. The nearest back to the engine; it was the second one from him as you get up in the cab.

Q. That was the window that was nearest to the engine the one that was broken?

A. Yes, sir.

Q. The sash on which you saw blood is the sash that you mentioned as being between those two windows?

A. Yes, sir.

Q. When you saw the engine and those window- was the next day I take it after your brother was killed the preceding night?

A. Yes, the next morning.

Q. The front window, the one out of which there was no broken glass you say was open when you saw it the next morning?

A. Yes, sir.

97 Q. I take it, of course, you do not know its condition at the time your brother was injured, whether open or shut?

A. No, sir.

Q. Are you married or single?

A. Married.

Redirect examination.

By J. M. Robsion:

Q. Tell the jury whether or not you saw any glass there broken glass?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, glass on the ground.

Q. If I understand this blood was on the window there, had run down the side of the engine?

A. Yes, sir.

GEORGE TOBIAS, being duly sworn as a witness for the plaintiff, testified as follows:

Direct examination.

By J. M. Robsion:

Q. How old are you?
A. Twenty-seven years old.
Q. Where do you live?
A. Middlesboro.
Q. What business do you follow?
A. Railroading.
Q. For what company?
A. L. & N.
Q. And in what capacity, what work do you do?
A. Brakeman.
Q. On what run or line of road do you brake, on what division?
A. On a branch called Stony Fork.
98 Q. From Middlesboro up Stoney Fork?
A. Yes, sir.
Q. Did you know Ed Parker?
A. Yes, sir, I knowed him what time he was there.
Q. Where were you working at the time he was killed?
A. On the yard.
Q. Where is that?
A. Middlesboro.
Q. What was Parker doing?
A. He was fireman.
Q. And who was the engineer?
A. Mr. Wilson.
Q. What were you doing on the yard at that time?
A. I was watchman; head end brakeman.
Q. Working on the yards there?
A. Yes, sir.
Q. Who else worked on the yards besides the fireman and engineer and yourself?
A. Mr. Town and Mr. Smith.
Q. Who was Town?
A. Conductor.
Q. What was he doing?
A. Handling the switch line,—gave us orders.
Q. Who do you mean?
A. Myself and Smith.
99 Q. What do you mean by handling the switch line?
A. He had a list of cars,—where they are going and what to do with them and different tracks and different places; had a list of them.
Q. A list written out on a piece of paper?
A. On a card.
Q. Who was it that directed you men there what cars to move and to what point to move them?

A. Conductor.
Q. That Mr. Town?
A. Yes, sir.
Q. And Mr. Town that give you and Smith orders which car to move and where to move, then what did you do?
A. He did not give me any orders; he was not suppored to give me orders; he gave Smith orders; he broke in the field on the switch.
Q. What did Smith do when the conductor give you orders as to what cars to move and where to move them?

Defendant objects; overruled; defendant excepts.

A. We were supposed to do what he told us to do,—put them where he said put them.
Q. What did the engineer have to do with it?

Defendant objects; overruled; defendant excepts.

A. Not anything only took his signal.
Q. Who gave the engineer the signal?

Defendant objects; overruled; defendant excepts.

A. Supposed they give me a signal, I was supposed to give the engineer the signal.
Q. Who would tell you what signals to give the engineer and what moves to make?
A. They give me the signal, the conductor or the other brakeman.
Q. What I am trying to get at, did you or Smith have the
100 right to direct the engineer to move any car or place any car or switch any car without the conductor Town telling you to give him that signal?

Defendant objects; overruled; defendant excepts.

A. No, sir.
Q. Did this switching crew of which Parker was a member, work day or night?
A. Night.
Q. About what time did you go to work at night?
A. 6:30.
Q. About what time was Parker killed?
A. Between 7 and 8 o'clock.
Q. What was your crew doing at the time Parker was killed?
A. They had hold of two cars,—one was going in 9 and going in with number 10 near the heading.
Q. You say that you were going,—you had a car up in 9 and one to go in 10?
A. Going in 10, the car I had hold of.
Q. You mean that was the number of switch tracks?
A. Yes, sir, going from like they were backwards 11, 10, 9, 8, 7 and 6.
Q. How many switch tracks did you have there?
A. I do not know how many.
Q. You say they were numbered?

A. Numbered 11, 10, —, 8, 7, 6, 5, 4, 3, 2, and number 1.
Q. You mean the switch tracks were numbered from one to eleven?
A. Yes, sir, across.
Q. What was the name of this track that you pass along there that the switches lead off of?
A. Track Number 11.
101 Q. What name did they go by?
A. That is the first track you come to on that lead, Number 11.
Q. That what you call the lead track?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, straight lead track.
Q. Also called number eleven switch?
A. Yes, sir.
Q. What was the number of the engine that was on that work?
A. 909.
Q. That a regular yard engine?
A. No, sir.
Q. What was the difference in it and a yard engine?

Defendant objects; overruled; defendant excepts.

A. Because the regular switch engines have a board of wood on it and have a pilot on it.
Q. Is there any other difference to this engine 909? Is there any difference in the regular straight engine other than the board?
A. No, sir, none outside of the board.
Q. Any difference in the construction of the rear of this 909 and the switch engine?
A. No, sir.
Q. In regular switch engines don't they have a regular——
A. No, sir, yards do not have any.
Q. You mean 909?
A. The regular switch engine- have a——
Q. Is there any difference in the way of a headlight or anything like that?
A. Our regular switch engines had a light set upon the tender.
Q. Small or large?
A. A large one,—about middle ways.
102 Q. Where was the regular switch engine?

Defendant objects; overruled; defendant excepts.

A. It had gone to the shop at Corbin.
Q. How long had you been using 909?

Defendant objects; overruled; defendant excepts.

A. I think we used it the first night we had it.
Q. The first night?
A. Yes sir.
Q. That night when you put the car in No. 9, as you say, and

was going into No. 10, when Parker was killed, was anything on No. 11 track?

Defendant objects; overruled; defendant excepts.

A. Yes sir.
Q. What was it?
A. 86 train was on,—freight local.
Q. And between what points did 86 train run?
A. Supposed to leave out at about 7 o'clock in the morning.
Q. Between what points?
A. Middlesboro and Corbin.
Q. You mean a local freight train?
A. Yes sir.
Q. And what was attached to that local 86 train that night?

Defendant objects; overruled; defendant excepts.

A. Caboose.
Q. Caboose?
A. Yes sir.
Q. Now, who had made up that train 86 and who directed it to be made up, if it was made up that night?

103 Defendant objects; overruled; defendant excepts.

A. Conductor.
Q. Who was that?
A. Mr. Town?
Q. Mr. Town?
A. Yes sir.
Q. You mean made up a complete train?
A. Yes sir.
Q. Who, if anyone had ordered that caboose to be put on 86 train?

Defendant objects; overruled; defendant excepts.

A. Conductor.
Q. Was the caboose attached to the train?
A. Yes sir.
Q. I believe you say you were coming down track to No. 11?
A. Yes sir, straight lead.
Q. How many cars did you have?
A. Had a lot on No. 10.
Q. Just before that. You spoke about putting one in 9?
A. We had hold of two——
Q. What did you do with the other cars before you got to 10?
A. Put it in 9.
Q. What was necessary to be done in getting the car from lead track 11 into the switch 9?
A. This car that was put in 9 was supposed to be a way car.
Q. What did you have to do with the switch or tracks there to get from 11 to 9?
A. When I put this car in 9, it throwed 9 switch to get to 10.
Q. What do you call that fixing the switch so it will go in?

A. I call it throwing the switch.
Q. Don't you call that lining up?

104 Defendant objects; overruled; defendant excepts.

A. Call it lining up and some call it throwing switches; either way you want it.
Q. Who throwed the switch or lined up 9 switch for this car to go in 10?
A. I do not know who lined up 9 and 8 and 10; I know I lined up 9 to get to 10 to put this car in; when I come out I lined it up.
Q. Who, if anyone directed you men to put the car in No. 9?
A. Conductor.
Q. What did this engineer and freight crew do when the car was put into 9?
A. Didn't do anything until I give him a signal to come out of 9 until I put this car in there.
A. After you got out of No. 9 and gave them a signal, what did you do then?
A. He obeyed it.
Q. Who did?
A. Engineer.
Q. On which side of the engine were you when you gave the signal to the engineer to go on to 10?
A. On the engineer's side.
Q. Could you see the fireman then?
A. No sir.
Q. Could the fireman see you?
A. I do not know whether he could or not. I could not see him.
Q. Which way was the engine headed, toward Middlesboro or toward Corbin?

105 A. Headed South.
Q. Which way was it going?
A. Going toward Norton, the way it was headed.
Q. Which way was the train moving when he got killed?
A. Backing up, going north toward Corbin.
Q. When this engine and car went into 10, tell the jury whether or not it struck anything or came in contact with anything on any other track there?

Defendant objects; overruled; defendant excepts.

A. In going in 10 with this car the cab on No. 11, the steps on this car touched the caboose; the engine cleared the caboose that much (indicating with his hands); the engine cleared it that much (indicating again).
Q. How many inches or feet?
A. About two feet I guess.
Q. Put your hand up there again?
A. Cleared it about that much (indicating with his hands).
Q. That the distance now? (Witness holding hands in position.)
Q. Yes sir.

Q. That is not two feet is it?
A. I said about it.
Q. Where was this man's head?
A. When I went back there from the shape I found him in he had been sitting a straddle his seat with his arms toward the window and his head out.
Q. You tell what you saw and not make any speech?

Defendants objects; overruled; defendants except-.

A. I am telling.
Q. Tell what you saw?
106 A. I am telling you now what I saw.
Q. Tell just what you saw?
A. I said when I and the engineer was there he had been sitting astraddle his seat with his hands hanging out that window and head out of that window and one of his gloves on and one off; so we taken him and brought him down in the deck and put him on a thing there; the engineer gave the distress signal and the conductor and other brakeman come and we taken him out of the engine and laid him on the ground and the engineer called him and he failed to answer.
Q. Wait a minute. Did you have a talk with me in my office the other day?
A. I talked with you.
Q. Is this the way of it,—when you got there the conductor had him up in his arms, I mean the engineer?
A. Had him upon his arm.
Q. Show the jury how the engineer had him up in his arms when you got there?
A. When I got there he had him up in his arm but he was still in his seat. He was bloody and he had him up in his arms and called me when I got there.
Q. Show the jury how the engineer had him up in his arms?
A. When I got there he was astride of his seat like this (here witness sits astride a chair with his face to the back of the chair). The engineer was behind him holding him up.
Q. Didn't you tell me in my office on the other day when
107 you got there the engineer had lifted him up and holding him up in his arms when you got there?

Defendant objects; overruled; defendant excepts.

A. No, sir, I told you the engineer held him up like I have shown you here.
Q. Didn't you tell me he had him in his arms and holding him up and had lifted him up off the seat?
A. He didn't; it was like I tell you now; he had him upon his arms when I got there.
Q. Did the engineer have him around his body?
A. Had him upon his arms, holding him up.
Q. Holding him up off what?

A. Just holding him up so he could sit up and breathe.
Q. Sitting up?
A. Upon his seat.
Q. Was he sitting up?
A. Sitting up by him holding him up.
Q. Sit upon his seat in his cab?
A. Yes, sir, the engineer was holding him up when I got there.
Q. Did you see the engineer pass the car?
A. No, sir, I was under the north end car.
Q. You was on the car that was being moved into 10?
A. Yes, sir, I was on the north end of it.
Q. Did the car that you were on did it hit the caboose?
A. Yes, sir?
Q. What part of the caboose that the car that you were on hit it? Did your car hit the caboose?
A. Hit it on the south end you should call it from the way I was moving.
Q. Mr. Tobias, let this straight line here represent No. 11 track (indicating to a drawing on the floor), and that mark here (indicating) let it represent the caboose on No. 11, and train 86 extended on further out toward Corbin?
108 A. Yes, sir.
Q. And these two lines here represent No. 10 switch. If I understand you your engine was backing down toward 11?
A. Backing down toward No. 11 before you get to 10.
Q. And had a car in front of the engine?
A. Behind it.
Q. Box or coal car?
A. Box car.
Q. And you were on which side of that box car?
A. On the engineer's side.
Q. That would throw you on the opposite from of the car where the caboose was?
A. No, sir, throw the caboose over there and me over here (indicating each time).
Q. You were on the opposite side of the car from the caboose?
A. Yes, sir.
Q. Were you on the end of the box car or upon the side?
A. Riding on the end.
Q. I thought you told the jury you were riding on the side?
A. Riding on the side or whatever you call it; I was not on top of it.
Q. Let this desk represent the box car? (indicating to desk of stenographers)
A. Yes, sir.
Q. And it going back in 10 the caboose would be to the right?
A. Yes, sir.
Q. And you were on the left side of this car?
A. Yes, sir.
Q. Where these steps and hand holds are?

A. Yes, sir.

109 Q. Could you see the fireman over there?

A. No, sir.

Q. You say that this car you were on hit the caboose?

A. Yes, sir, this car I was on hit the caboose.

Q. Did you see it or hear it?

A. I heard it.

Q. You heard it hit?

A. Yes, sir.

Q. How long from the time you heard the car you were on hit the caboose until you had information the fireman was killed?

A. When the car hit the caboose the man in the field was giving me a signal and I was giving it to the engineer.

Q. I asked you how long it was?

A. I do not know. What did you say?

Q. From the time you hear- the car you were on hit the caboose how long until the fireman was killed?

A. I do not know; might have been 3 or 4 or 5 minutes.

Q. Did the car stop?

A. The car could not stop unless the engine stopped.

Q. Did the engine stop?

A. The engineer stopped?

Q. Did he stop before or after he was killed?

A. He never stopped until after the killing I do not reckon.

Q. There was just one box car and it was next to the engine?

A. Yes, sir.

Q. How long was it from the end of the box car to where the fireman was?

A. I guess about 18 or 20 feet from the end of the car back.

Q. From the time you heard it hit the caboose,——

A. I heard it scrape the caboose——

110 Q. How long was it until it got back to the point where the fireman was?

Q. Might have been 2 or 3 minutes.

Q. You mean it took the train two or three minutes to go 18 or 20 feet?

A. It taken his engine to get back to this caboose.

Q. Tell the jury whether or not after you heard the car that you were on scrape the caboose, whether or not the engine stopped then until the fireman was killed?

A. The engineer heard the racket himself; I heard it.

Q. Tell the jury whether or not it stopped until he was struck?

A. I do not know; I do not suppose it did.

Q. The engine and car kept moving on into 10?

A. Yes, sir, still going into 10.

Q. How far into 10 had it got before it stopped?

A. We had got about a rail length.

Q. How long is that?

A. 30 feet.

Q. You mean the box car and engine both had got into 10.

A. Got about a rail length into 10.

Q. You mean the front end of the engine had passed into 10 about 30 feet?

A. The back end of the engine had.

Q. How long have you worked on the railroad in switching and handling cars?

A. About three years.

Q. Tell the jury what rule, if any, there is as to what distance there must be between cars sitting on one track from another track in order to be in the clear?

111 Defendant objects; overruled; defendant excepts.

A. Generally the way to tell in the yard the rules is to get on this track here (indicating) and stand on one track, and the car switching on this track (indicating) and you can not touch it with your hand this way (indicating) by reaching out the hand straight, the arm length, why it is in the clear.

Q. Do you mean you could stand on track No. 10—that is, on the switch on the rail next to No. 11, and would reach out your right hand toward No. 11, and if you could not touch the car, then it would be in the clear?

Defendant objects.

A. Yes, sir.

Q. About what distance is that in feet that you say where you stood on the rail of one track next to the switch track and reached out and if you can not touch the car with your hand extended, it is in the clear?

Defendant objects; Defendant excepts.

A. I do not know how many that is exactly.

Q. Just about,—3 or 4 feet is it?

Defendant objects; overruled; defendant excepts.

Q. It is more than that.

Q. And how much is it?

A. It is about 20 feet.

Q. What are you talking about when you say it is 20 feet?

A. It is about 20 feet from one point of the railroad over to another; that is—from one track to another.

Q. 20 feet?

A. Yes, sir.

Q. Let's see if you understand me. I do not think you do. Do you mean that the tracks and the trains have to be 20 feet apart to be in the clear?

Defendant objects; overruled; defendant excepts.

112 A. For instance here is a track and one here (indicating) and one here (indicating); if I stand here (indicating) and my hand can not touch this (witness standing with his arm stretched the full length outward), it is supposed to be in the clear.

Q. How far is the distance then from where you stand on one rail and reach out and extend your arm out to the car on another rail

and can not touch it and know it is in the clear? What is the distance?

A. About 20 feet.

Q. I want to know what the distance is from where you stand across to the car you can not touch?

A. That is what I am telling you now, about 20 feet.

Q. Do you mean you can reach 20 feet?

Defendant objects; sustained.

Q. Anyhow you stand on one rail next to a car, the inside rail next to a car on a track and extend your arm out, and if you can not touch the car, that is on the other track that is just in the clear?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.

Q. What if you can touch it?

Defendant objects; overruled; defendant excepts.

A. It won't be in the clear.

Q. Would not be in the clear?

Defendant objects; overruled; defendant excepts.

A. No, sir.

Q. What do you mean by "being in the clear"?

Defendant objects; overruled; defendant excepts.

A. We mean in the clear of the next track to it—like 10 and 11—If a car was hanging on No. 10 and was not in the clear you could not get in 9.

113 Q. Do you mean to permit the cars to pass them they rub the track?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.

Q. How much space should there be between the cars in passing to be in the clear?

Defendant objects; overruled; defendant excepts.

A. (No answer.)

Q. If you should stand on a rail of No. 10 and reach out toward No. 11 and could not touch the car, you would say it was in the clear?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.

Q. What is the distance right across from the rail where you stood on that track over to where you can not barely touch the car on 11?

Defendant objects; overruled; defendant excepts.

A. All the tracks are not alike; some have a curve and some are straight.

Q. Suppose I am standing on track 10 on the rail next to 11, and you have told the jury to clear is to reach out and see if you can not touch the car on No. 11. What is the distance from where I am standing on No. 10 track to where I am reaching and barely touching the car on 11; how many feet it that?

Defendant objects; overruled; defendant excepts.

A. I do not know, 20 feet.

Q. Stand up (here witness stands up); Stand with your foot on track No. 10, switch No. 10, and reach toward No. 11, and tell the jury how far you have to reach to know the car is in the clear on No. 11?

(Here witness stands with his arm outstretched.)

A. If here is 10 (indicating) and here 11, (indicating); I would be on 10, and I would extend my arm and can not touch the car, it is supposed to be in the clear.

114 Q. What is the distance you have reached?

A. I do not know.

Q. Is it not about 4 feet? Don't you mean from the middle of your body to reach out there from the middle of your body is that not the distance?

Defendant objects; overruled; defendant excepts.

A. Do you mean from the length of my arm to end of my finger would be four feet?

Q. Yes, sir?

A. No, sir.

Q. About how much is it then?

A. About 20 feet, 15 or 20 feet.

Q. When you say that you stand on one track, on the inside rail next to the track of the freight track and extend your arm out there, and if you can not touch the car on the other track, it is in the clear, you mean an arm of an ordinary person reaching?

A. Yes, sir.

Q. Tell the jury whether or not this caboose was situated that distance from track No. 11, whether or not the caboose on track No. 11 was in the clear of track No. 10 at the time Parker was killed? In the clear the way you have described the train being in the clear?

Defendant objects; overruled; defendant excepts.

A. Yes sir, it cleared it, all but the steps of the car; it didn't touch the other car at all. These steps.

115 Q. But tell the jury whether or not this caboose, the end of the caboose on No. 11 was as far from No. 10 track so you could stand on the side of the rail at 10 track and extend your arm out straight and not touch the caboose on No. 11?

Defendant objects; overruled; defendant excepts.

A. Yes, the caboose was in the clear.

Q. Did you see the caboose after this man was killed?

A. Yes, sir.

Q. What was the condition of it?

Defendant objects; overruled; defendant excepts.

A. The condition of it when I seen it one step was off and the marker was knocked off.

Q. Where is the step? Is it the lower part of the car next to the ground?

A. It goes upon top of the caboose.

Q. You mean those iron rods?

A. Yes, sir.

Q. They stick out about how many inches from the side of the car?

A. Two or three inches.

Q. You say they were torn off?

A. Yes, one or two of them torn off and a marker.

Q. Do I understand you that one or two of those iron rods on the side of the caboose were torn off?

Defendant objects; sustained; plaintiff excepts.

Q. What are they fastened on the cars with?

A. Fastened with iron.

Q. What is this marker fastened on there with that is on the end of the caboose?

A. Fastened with wood, of course.

Q. Is it iron or wood, the marker?

A. Iron a piece and wood.

116 Q. Tell the jury whether or not the caboose was rubbed or scraped up?

Defendant objects; overruled; defendant excepts.

A. No more than those steps where you go on top of it.

Q. That the only part?

A. Yes, sir.

Q. They were just torn off?

A. Yes, sir.

Q. Did you see any blood of anything like that on the caboose?

A. I did — notice of that; I do not know whether there was or not.

Q. What was the condition of the cab of the engine?

A. Not anything.

Q. Was it broken of injured in anyway?

A. No, sir, did not touch it.

Q. Did not touch it at all?

A. No, sir.

Q. Did you see any glass around there?

A. No, sir.

Q. The engine you were using was #909?

A. #909.

Q. What were you going to do with the car you were putting in No. 10?

A. I think it was going to Mr. Hoe.

Q. Who is Mr. Hoe?

A. He runs a business.

Q. It was being put there in Middlesboro?
A. Yes, sir.
Q. I wish you would described that caboose as to what kind of a caboose it was on which Mr. Parker was killed?
A. I do not understand you.
Q. Tell us what kind of a caboose it was, regular or box car?
A. It was a regular caboose.
Q. What color was it painted?
117 A. Red.
Q. What letters did it have on it?
A. L. & N.
Q. Have any number on it?
A. Yes, sir.
Q. Where was that caboose going, that train of which it was a part and the train going?
A. Corbin.
Q. Tell the jury whether or not Middlesboro was then the end of the division, freight division of a local freight?
A. Yes, sir.
Q. Where was the other point?
A. Corbin.
Q. What kind of a night was that?
A. The moon was not shining; it was on the dark of the moon.
Q. You mean no moon shining.
A. No, sir, no moon shining.
Q. How do you make signs to the engineer to move a train?
A. With my lantern.
Q. I believe you say he was on the right side of the engineer?
A. The fireman was.
Q. On the left I mean the engineer was?
A. Yes, sir.
Q. Why did you give the sign to the engineer?
A. Because he was the one I was supposed to give it to.
118 Q. What does the fireman do on the engine?
A. Keeps it hot.
Q. Keeps up steam?
A. Yes, sir.
Q. Who works levers and moves the engine?
A. The engineer.

Defendant moved the court to exclude the last answer; overruled; defendant excepts.

Q. Tell the jury whether or not the engineer or fireman at any time in the switch there while Parker was at work there had the right to go into the switches and tracks and get any cars and move them without the conductor, Town ordering it to be done?

Defendant objects; overruled; defendant excepts.

A. No, sir.
Q. Who lined up track No. 10 before you moved out?
A. I do not know who; I could not tell you.

Q. Didn't Mr. Town line it up?

Defendant objects; overruled; defendant excepts.

A. I do not know, sir.
Q. Did you do it?
A. No, sir, I did not.
Q. Did you see the persons out there that were doing it?
A. No, sir.
Q. Was any person out there ahead of you?
A. Not only the crew, they were out there.
Q. Mr. Town was out there?
A. Yes, sir, and Smith.

Q. Didn't he line up track No. 10?

119 A. I do not know whether he did or not.

Q. Didn't he inform you he lined up track No. 10 and told you to go on?

Defendant objects; overruled; defendant excepts.

A. No. 10 was lined up when I switched it, I do not know who did it.

Q. Did Mr. Town inform you that he lined up No. 10?

Defendant objects; sustained; defendant excepts.

Q. Didn't he tell you he did line it up?
A. He did not tell me.
Q. Didn't you tell me in the room while ago that the conductor Town told you that he had pined up No. 10?

Defendant objects; overruled; defendant excepts.

A. He did not have to tell me, I could see No. 10.
Q. Didn't he tell you it was lined up?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.
Q. Didn't Mr. Town tell you he lined it up, that he had lined up No. 10?

Defendant objects; overruled; defendant excepts.

A. He said he lined it up.
Q. That night didn't he line it up and direct you to have the engineer to move this car in No. 10 that night before Parker was killed?

Defendant objects; overruled; defendant excepts.

A. He told me to enter No. 9 and go in No. 10.
Q. Didn't Mr. Town in charge of the work there, direct you and Smith to signal the engineer and for him to put that car in No. 10 there? Didn't Mr. Town direct you to do that?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.

120 Q. Tell the jury whether or not you would have signalled the engineer there, or made any effort to put that car in

No. 10 before Mr. Parker was killed if Town had not directed you to do it?

Defendant objects; overruled; defendant excepts.

A. No, sir.

Q. Tell the jury whether or not the engineer was given any of these switch lines or knew anything about how which car was to be placed before you gave him the signal?

Defendant objects; overruled; defendant excepts.

A. No, sir.

Q. Was the fireman given any light and did you or Mr. Town or Mr. Smith offer to give the fireman any information as to how the different cars were to be switched or moved?

Defendant objects; overruled; defendant excepts.

A. No, sir, he was not supposed to give them any.

Q. Did you see any injury on Mr. Parker's body?

A. No, sir, only around here under his neck (indicating).

Q. What was the matter with it?

A. I think a hole knocked in here and back under here (indicating).

Q. A hole knocked in his jaw?

A. Yes, sir, somewhere along there (indicating).

Q. On which side?

A. I disremember what side now.

Q. Tell the jury whether or not his neck was broken?

A. They said it was broken.

121 Q. Describe how his neck was when the engineer was holding him up in there?

A. His neck laid in this position (indicating).

Q. When you handled him, describe to the jury how his neck moved, whether or not it was stiff or moved?

A. I could not say about that. The engineer had hold of his body and I had hold of his feet.

Q. Where had you got this car that was to be placed in No. 10?

A. Got it off No. 7.

Q. And in what County and State is this switch yard where Parker was working when he was killed?

A. Bell County.

Q. In Kentucky?

A. Yes, sir.

Q. I forgot what you stated and I forgot what hour in the night this man was killed?

A. Between 7 and 8 o'clock, as near as I can get it; that is my best judgment.

Q. What did the fireman get, what wages did they pay them?

Defendant objects; overruled; defendant excepts.

A. I do not know, sir. It was two something, I do not know what the remainder was.

Q. For the purpose of refreshing your recollection if I can, was it not $2.46?

Defendant objects; overruled; defendant excepts.

A. It was two dollars and something, I do not know the cents.
Q. I believe you say you went to work that night at 6:30, that the regular time you go to work?
A. Yes, sir.

122 Q. What time in the night or next morning did you quit work?

A. I quit when I got done.
Q. What was the hour? Did you have any regular hour to quit?
A. Yes, sir, we had a regular hour; supposed to work until 5:30 the next morning.

Cross-examination.

By H. H. Owens:

Q. George, in the event you were coupling up a car on the opposite side of the train from the engineer and then you wanted the engine to move the cars, to whom would you give the signal?
A. Engineer.
Q. If you were on the opposite side from the engineer to whom would you give the signal? If you were on the fireman's side?
A. I would give it to the fireman.
Q. What does the fireman do with the signal after it was given to him?
A. He give it to the engineer.
Q. Tell the jury whether or not there is any other way when you are on the fireman's side of the train, to couple a train up and want to move to give the signal to the engineer, except to give it to the fireman and have him to give it to the engineer?
A. There is no other way if he is on the fireman's side.
Q. If you are on the fireman's side and you desire the train to stop or the engine to stop, to whom do you give the signal?
A. Fireman.
Q. What does the fireman do with the signal?
A. Delivers it to the engineer.

123 Q. If you were on the fireman's side of the train and you desire the train to stop or the engine to stop, what do you do?

A. Give the fireman the signal.
Q. If you are on the fireman's side and desire the engine and train to slow up and not go fast, what do you do?
A. Give the fireman the slow signal.
Q. What does the fireman do?
A. Delivers it to the engineer.
Q. In the event you are on the fireman's side and desire the train to go fast, what do you do?
A. Give the signal to the fireman.
Q. What does the fireman do?
A. Delivers it to the engineer.

Q. About how long is a box car?
A. Some 36 feet and some 40.
Q. About how long was the box car which you had in front of the engine tender at the time you were backing up into switch No. 10?
A. About 36 feet.
Q. How long was the tender of your engine?
A. About 18 feet.
Q. And that I believe on that occasion was between the box car and the engine,—the tender?
A. Yes, sir.
Q. About how far is it from the coupling of your tender; that is, the back end of your tender next to the engine up to where the fireman sits in his seat?
A. I suppose that is about 17 feet.
Q. I mean from where it couples up to where the fireman sits?
A. That is about 20 feet.
Q. I mean the coupling next to the engine?
A. Coupling next to the tender?
Q. Yes.
A. About 7 or 8 feet.
124 Q. And if I understand you, you were on the front end of this box car the way it was going but on the opposite side from the fireman, and you heard something scrape the box car when it came even with the caboose?
A. Yes, sir.
Q. Where was the scraping at the top or bottom or middle?
A. It was at the top of the box car.
Q. Describe the marker that was on that caboose? Show the jury?
A. It was about that wide (indicating) and about so high (indicating with his hands.)
Q. Stuck out 6 or 8 inches from the caboose?
A. Yes, sir.
Q. Is that made of iron or what?
A. What the marker is set down in is iron.
Q. Where it is attached to the caboose is that iron or wood?
A. It is wood at the caboose.
Q. That extending where the marker sticks in, holding it to the caboose is that iron or wood?
A. Iron.
Q. Iron rod?
A. Yes, sir.
Q. About how large?
A. It is not larger than my wrist; about that large.
Q. About how large?
A. About the length of my two thumbs.
Q. About how fast was that engine and car moving when you heard that scraping?
A. They were backing up about six miles an hour I guess.
Q. That is a little faster than a man can walk, is it?

A. I do not know, sir.

Q. How long did you continue to hear that scraping of that up at the top of your box car? Whether it quit or kept up as long as the box car moved?

A. No, sir, it may run about a minute or two.

Q. A short time and then it stopped?

125 A. Yes, sir, it stopped.

Q. Did the scraping run the entire length of the box car?

A. No, sir, didn't scrape anywhere except where the steps were that go upon top of the box car.

Q. Did the box car scrape the caboose or did the steps on the caboose scrape the box car?

A. I do not know which scraped; they were caught together.

Q. If I understand what the steps is on the box car,—there is a rod of iron that sticks out for a little piece then points out in the direction of the box car and comes back and connects to the box car.

A. Yes, sir.

Q. Stands out four inches?

A. Yes, sir.

Q. Same arrangements on a caboose?

A. Yes, sir.

Q. Those two steps had come together on the caboose and on the car?

A. Yes, sir.

Q. How loud did that marker or step scrape? How loud a noise did it make?

A. It made a pretty good noise; guess the engineer could have heard it and I could have heard it.

Q. How far could you have heard that if you had been listening?

A. I guess I could have heard it 20 or 30 feet if I had been listening.

Q. That is when the engine is moving and the cars moving?

A. Yes, sir.

Q. If I understand you, during that time the caboose on track 11. Let this paper indicate the box car, and up to my hand the tender?

A. Yes, sir.

126 Q. The fireman was still back here (indicating).

A. Yes, sir.

Q. At the time the box car moved until the front end of the box car reached where the caboose was extended you heard the scraping noise?

A. Yes, sir.

Q. And this fireman was still back of that box car and back of the tender and in his position in the seat in the cab?

A. Yes, sir.

Q. That was something like 60 feet from where the scraping first began to where the fireman was sitting?

A. Yes, sir.

Q. I believe you say it was the dark of the moon?

A. Yes, sir.

Q. Tell the jury whether or not one could see that night without the use of lights?

A. Yes, sir, you could see.

Q. Tell the jury whether or not there was anything to prevent any person, sitting as the fireman was in his seat, if he had been looking ahead in the direction in which the train was moving, anything to prevent him from seeing the box car which he was approaching?

A. Not anything at all.

Q. You were asked about the lights being on the back of your tender on a regular switch engine. If I understand you that light was located about the middle of your tender?

A. Yes, sir.

Q. When you were approaching the box car that light merely shone up against the box car?

A. Yes, sir.

Q. There is no way for the light to go out from behind that box car and shine ahead of the box car when you were moving with the box car in front, was there?

127 A. No, sir.

Q. In which direction is it the duty of the person in the engine to look when the train is moving?

A. If the train is backing up he looks back and if it is going ahead he is supposed to be looking ahead.

Q. In other words, the fireman and engineer are expected and required to be looking in the direction in which the train is moving?

A. Yes, sir.

Q. Do you know how many cars were to be switched with that caboose on track No. 11?

A. No, sir.

Q. Do you know whether or not the caboose was attached to those cars or not?

A. Yes, sir, the caboose was attached to them.

Q. Do you know who attached that caboose to the cars?

A. No, sir.

Q. Do you know how long they had been attached?

A. No, sir.

Q. Do you know whether or not the crew, of which you were a member, had placed those cars there that night?

A. Yes, sir.

Q. You had placed them?

A. Yes, sir.

Q. Was Ed Parker a member of your crew then?

A. Yes, sir.

Q. And tell the jury whether or not he assisted in placing these cars and setting on the tracks? That is,—whether or not he helped to give and receive signals while the cars were being placed on track No. 11?

128 A. Yes, sir, he was told about it.

Plaintiff objects.

By the Court: "Read the question."

(Here Court reporter read the former question to the witness.)

A. Yes, sir.

Q. I believe Mr. Robsion asked you in detail about placing cars on track No. 9. Tell the jury what you had done after the engine had gone out of track No. 9?

A. We backed in No. 10 with the head car. That one car.

Q. If I understand you, you run down far enough to clear the switch on track No. 10, and then you moved back into track No. 10 when Parker was hurt?

A. Yes, sir.

Q. When had you seen Parker if you remember before that?

A. He was on the head end engine with me once.

Q. How long before that?

A. I do not know; might have been thirty or forty minutes before.

Q. Had you seen him any time between that and the time he was hurt?

A. No, sir.

Q. I believe you say you were the first person who got to the engineer, after you learned that Parker was injured?

A. Yes, sir, I was the first one.

A. And he was then standing holding Parker under the arms?

A. Yes, sir.

Q. Had he removed him from his position in the cab?

A. No, sir.

Q. Had he taken him out from his position in the seat?

Plaintiff objects; overruled; plaintiff excepts.

A. No, sir, just holding him under the arms.

Q. Describe to the jury, in order that the attorney for the
129 plaintiff may know, the position in which he was when you got there?

A. He was still sitting a straddle of his seat, and the engineer had him under his arms holding him up, he was bleeding—I suppose to keep the blood from strangling him he had him under his arm; he called me to him and we taken him and put him down in the deck.

Q. Had he lifted his weight off the seat?

A. No, sir, just holding him.

Q. Just straightened him up?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes, sir.

Q. Tell the jury whether or not his arms were still out of the window?

Plaintiff objects; overruled; defendant excepts.

A. Yes, sir, his arms were still hanging on the edge of the window on the outside.

Q. How far was his head out of the window at that time?

A. The engineer had him sitting upon the seat even from the window.

Redirect examination:

Q. I believe you say his hands were on the window?
A. Yes, sir, on the edge.
Q. You do not know how they got there do you?
A. No, sir.
Q. I believe you told the jury in answer to my question the fireman had nothing to do with putting that caboose in there on 11. Did the fireman have anything to do with putting the caboose in there on 11?
A. I do not understand.
Q. Did Parker have anything to do with putting the caboose in there on 11 where he was caught?
130 A. The conductor told us all.
Q. Told you all?
A. Yes, sir.
Q. Don't you know the fireman was in his cab and so was the engineer, and have you not so stated to the jury that the conductor had his men on the ground and he told you and Smith and didn't tell the engineer or fireman, but they had to do what you men on the ground signalled them to do?
A. Sure they have to do what we signalled them to do.
Q. You tell the jury Mr. Town told Mr. Parker to put the caboose in?
A. I did not say he told Mr. Parker.
Q. Do you say he told it where he could have heard it?
A. Yes, sir.
Q. Where was that?
A. Down on the side of the engine.
Q. On the side of the engine?
A. Yes, sir.
Q. And over there told Parker there?
A. He was telling the whole crew.
Q. Do you know that Parker heard it?
A. Yes, sir.
Q. You know that?
A. Yes, sir.
Q. Do you tell the jury that Parker and the engineer did not know anything about how each car was to be moved? Didn't you state it was none of their business to know?

Defendant objects; sustained; plaintiff excepts, and avows that if the witness were permitted to answer he would answer in the affirmative.

Q. Is this not it; that that yardmaster there or conductor
131 Town that he gave the tracks to you and Smith, and you signalled the engineer to move cars and switch them about?

Defendant objects; overruled; defendant excepts.

A. Sure, whenever the engineer give me a signal.

Q. Did the engineer or fireman have any right to move any car there or switch it about unless you or Smith or Conductor Town signalled them to do it?

Defendant objects; overruled; defendant excepts.

A. No, sir.

Q. Tell the jury whether or not Parker or the engineer on that night or you or Smith attempted to move any car there or switch any car or place it in any place until Mr. Town first ordered you to do it?

Defendant objects; overruled; defendant excepts.

A. No, sir.

Q. Tell the jury whether or not in making up this train 86 and attaching the caboose to it, whether or not either of those cars were moved or that caboose was put there, except upon the order of Mr. Town the person in charge of that work?

Defendant objects; overruled; defendant excepts.

A. No, sir.

Q. Tell the jury whether or not this car was moved in No. 9 or No. 10, moved at either place there until Mr. Town had given the orders for it to be moved in that way?

A. No, sir.

Q. There is another matter,—Tell the jury whether or not if this train—this caboose on 11 had been set so if you were standing on 10, you would reach out with your arm and not touch it, whether or not these handles would have rubbed there like you say?

132 Defendant objects; overruled; defendant excepts.

A. I do not know about that; I did not try it.

Q. Don't you know when a car is in the clear that no part of it will touch? That a car that is put in the clear, according to the rules, that no part of it will touch?

Defendant objects; overruled; defendant excepts.

A. It is owing to what size car it is.

Q. Any sort of a car? The kind you were using that night there?

Defendant objects; overruled; defendant excepts.

A. We were using all kinds.

Q. Don't you know that that box car there and that caboose would not have touched if it had been in the clear?

Defendant objects; overruled; defendant excepts.

A. It did not touch the engine.

Q. Didn't it tear off the upper part,—that little tin over the cab, tear it off?

A. No, sir.

Q. Didn't it break the glass?

A. No, sir.

Q. You did not see it?
A. No, sir.
Q. You mean it did not do it or you did not see it?
A. No, sir, it did not do it.
Q. Where do you work now, for the Company?
A. Stoney Fork branch.

Recross-examination:

Q. Mr. Robsion has asked you a good many questions about whether or not the fireman had anything to do with placing the cars. If I understand you after you and John Smith had got your orders from the conductor that no car could be placed without the
133 engineer or fireman one received your signal and then moved the train?
A. No, sir.
Q. If I understand you John Smith and Ed Parker were working there as firemen and proceeded to take part in placing these cars that made up train 86 together with that caboose?

Plaintiff objects; overruled; plaintiff excepts.

Q. Yes, sir.
Q. He and the engineer simply carried out the instructions which you and the other employes gave them?
A. Yes, sir.
Q. And placed the cars where you men told them to place them is that true?
A. Yes, sir.

Redirect examination:

Q. Was it not the duty of the fireman to do the firing?
A. Yes, sir, it was his duty to fire and look out for signals.
Q. At the time he was killed nobody was trying to give him any signal was there?

Defendant objects; sustained; plaintiff excepts and avows that if the witness were permitted to answer he would answer in the negative.

GEORGE TIBIAS, recalled by the defendant for further cross-examination:

Q. George, which is wider the cab in which the fireman and engineer ride or the box car which you were pushing back on your tender on that night when Parker was injured?
A. The box car.
134 Q. About how much wider on the side; how much more does this stick out?
A. 4 or 5 inches.
Q. Each side you mean??
A. Yes, sir.

Redirect examination:

Q. How wide was the box car?
A. I do not know sir, exactly.
Q. How wide was the cab of the engine?
A. I do not know.
Q. Did you measure either one of them?
A. No, sir.
Q. This caboose that they run into was standing on the same track that they were backing down?
A. The caboose was on the left.
Q. When they were backing down 11 to go into 10?
A. Backed out of the same lead.
Q. Same lead?
A. Yes, sir.
Q. In backing down 11 toward 10 this box car you spoke of was between the engine and that caboose was it?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.
Q. Another matter, was Mr. Parker off on the ground any time there helping to place the cars that made up that train 86?
A. No, sir.
Q. You spoke of seeing him some short time before that when he was down on the foot board, where was that?
A. Going out of No. 4.
135 Q. What was he doing down on the foot board?
A. When he come out there he turned his headlight up some.
Q. And you were not switching any cars and he was not helping you switch cars there?
A. No, sir.
Q. Where did you get instructions from Mr. Town to put that car in 10?

Defendant objects; overruled; defendant excepts.

A. Taken from the conductor.
Q. How long were you putting it in there?
A. Before putting it in 10?
Q. Yes?
A. We was backing in there with it.
Q. How long before you backed in there with it had you got instructions from Mr. Town to put it in there?
A. 7 or 8 minutes I suppose.
Q. When you were going back there, did you notice that the car was going to run into that caboose?

Defendant objects; overruled; defendant excepts.

A. No, sir.
Q. And when you say you heard some rubbing, did you give the engineer any signal to stop or anything like that?

Defendant objects; overruled; defendant excepts.

A. No, sir.
Q. What noise does an engine make itself when it is moving?
A. It is according to what kind of a load.
Q. At that time what noise did the engine make?
A. Not making any noise at all hardly, just coming along.
Q. That makes noise don't it?
A. Not to amount to anything.

Recross-examination:

136 Q. You were on the opposite side from where the scraping was on the box car?
A. Yes, sir.
Q. And the fireman was on the same side that the scraping was?
A. Yes, sir.
Q. If there was any trouble there, whose duty was it to signal, the engineer'- or fireman's or whose?

(Pl'ff objects; overruled; Plff. excepts.)

A. The fireman's.

Redirect examination:

Q. Did the fireman at any time that night, so far as you saw, move that engine at all?
A. No, sir.
Q. You mean when it is his duty to signal to the engineer, is when he knows something is going to happen?
A. Yes, sir.

Recross-examination:

Q. Tell the jury whether or not the engine was moving about in the yards while the fireman was down on the foot board with you?
A. Yes, sir, the engine was moving at that time.
Q. Tell the jury whether or not there was any difference in its moving when he was near the ground than it was at any other time when it was moving there?
A. No, sir, there was not any difference.
Q. Tell the jury whether or not the movement- of your engine in the yards there were made rapid as when running on the main line, or whether its movements in running short distances are made at a slower rate of speed?

Plaintiff objects; overruled; plaintiff excepts.

A. It is made at a slower rate of speed.
Q. How far had your engine moved from the time you started backing the box car into track 10 up until the caboose struck the box car?

137 Plaintiff objects; overruled; plaintiff excepts.

A. About a rail length and a half.
Q. You say a rail is 30 feet long?
A. Yes, sir.

Q. It had moved about the length of the box car?
A. Yes, sir.

Redirect examination:

Q. You do not know what part of the train struck that marker? you did not see it?
A. The marker is there to show it.
Q. The marker was knocked off?
A. Yes, sir.
Q. The marker is on the rear end of the car?
A. Yes, sir.
Q. You did not see it when it struck it?
A. No, sir.

Recross-examination:

Q. If I understand the marker was on the caboose and not on the box car?
A. Yes, sir, on the end of the caboose.
Q. On the same end of the box car the marker was approaching?
A. Yes, sir.
Q. The front end of the box car struck the marker on the caboose?
A. Yes, sir.

Redirect examination:

Q. You saw it do that?
A. No, sir, I saw the sign.

J. M. Robsion: Reads from the Kentucky Statutes. I
138 am reading from the tables which show the expectancy of life, page 1964 of the Kentucky Statutes, by Carroll, 1909. "A person 24 years of age the expectancy in life is 32.7".

Cross-examination.

H. H. Owens:

Q. Does that table show what part of that expectancy a man will be sick?
A. It just says "showing the expectancy of life in the United States according to Dr. Wigglesworth's Tables".
Q. That table is not based on expectancy of life in any extra hazardous employment is it?
A. It does not say in any employment; it is passed upon the general expectancy of all the persons in the United States.
Q. You know the fact that that Table is made up from the report- of Insurance Company-s?
A. I do not know what it is made up from; it is just here in the book, showing the expectancy of life in the United States according to Dr. Wigglesworth's table.
Q. Tell the jury whether or not there is anything about that Table to indicate how much of that time a man will not be able to work and earn a living?

A. It does not say anything about that.
Q. Will you answer my question?
A. It does not show anything except what I have stated.
Q. There is nothing shown by that table how — a man will be able to earn or the rate at which this man was earning at the time he was killed?
A. No, nothing about his earnings.

139 SAM PARKER recalled by the plaintiff for further examination:

Direct examination:

Q. What was the number of this engine you saw on the yards at Middlesboro when you went up there after your brother was killed?

Defendant objects; overruled; defendant excepts.

A. #909.
Q. I overlooked to ask you whether or not there was any other breake or injury to the engine,—this engine #909 except the glass of the cab broken out, was there any other?

Defendant objects; overruled; defendant excepts.

A. That rod that goes up by the side of the cab that they take hold of to pull up on the cab it was bent around in what they call the gong.
Q. Of what material is that?
A. Iron rod or steel.
Q. How large?
A. Something like half as big as my arm.
Q. Now Mr. Parker, assuming this desk (indicating to Court reporter's desk) is the side of the cab; at this point here (indicating) is the step going up into the cab of the engine. Where is the iron?
A. Right on the side, something like that (indicating)
Q. How long is it up and down?
A. It reaches up I think the best I remember to the top of the coal tender, about that.
Q. In what direction was it bent?

Defendant objects; overruled; defendant excepts.

A. Bent around in where they climb up.
Q. Toward the outside or inside of the engine?
A. Toward the inside.

140 Q. You mean it was bent in to the side of the steps where they go up?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, bent up like it would be in the way of where they would go up.
Q. Which way was it bent?

Defendant objects; overruled; defendant excepts.

A. As you climb up it was bent in toward where they go up.

Q. How much did it stick out in its natural position?

Defendant objects; overruled; defendant excepts.

A. I do not know exactly, 6 or 8 inches or probably further.
Q. How much was it extended outside when you saw it, if any?

Defendant objects; overruled; defendant excepts.

A. I do not think it was any outside; I think it was bent plumb in the best I remember.
Q. I wish you would describe your brother's condition of health and appearance of health at the time and for some time before he was killed?

Defendant objects; overruled; defendant excepts.

A. He was in good health so far as I know; I never knowed of him being sick in a good long while.
Q. Tell the jury whether or not he was a stout, hearty, able-bodied man or weakly?

Defendant objects; overruled; defendant excepts.

A. He was stout.
Q. How regularly, if at all, did he work?

Defendant objects; overruled; defendant excepts.

141 A. He had been working pretty regularly all along since he had been working for the Company.
Q. What wages did he earn from the Company?

Defendant objects; overruled; defendant excepts.

A. Would say from $50.00 to $90.00 and along there.
Q. Did I ask you this morning about the caboose?
A. I think so.
Q. Did you see any blood or flesh on the caboose?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.
Q. What did you see in the way of flesh on the caboose?

Defendant objects; overruled; defendant excepts.

A. There was some flesh on one corner of the caboose up where he was caught against it.
Q. Did you notice his hands after he was killed?

Defendant objects; overruled; defendant excepts.

A. No, sir.
Q. Did you see any wounds on his hands in any way?
A. Not any at all.

Cross-examination.

By H. H. Owens:

Q. The time you speak of seeing this engine I believe you say it was on the day after your brother was killed in the night?

A. Yes, early next morning.
Q. What time?
A. I went up on this early train that runs about Three.
Q. How did you happen to be there in the yard?
A. I asked a fellow to go down there with me to see where he was killed.
Q. Tell the jury whether or not the car and whether the engine had been used all that night up until the next morning?
A. I was not up there, I do not know.
142 Q. Do you know anything about that?
A. No sir.
Q. Do you know when this hand hold was bent, you do not know when it occurred?
A. No sir.
Q. This was the hand hold that you go up in the engine with?
A. That you climb up with.
Q. On the side of the cab or tender?
A. On the tender I think.
Q. Which is it?
A. I disremember; the best I remember it was on the tender.
Q. Think about it, tell the jury whether or not it was on the side of the tender or cab?

Plaintiff objects, overruled; plaintiff excepts.

A. The best I remember it is on the tender.
Q. On which side of the engine was it?
A. It was on the left side I think.
Q. Of the engine?
A. I do not remember now which side it was on. It was on the right hand side as the engine would be going yon way I believe.
Q. Going South?
A. I do not remember now which side it was on.
Q. I would like for you to be definite about that, Mr. Parker if you can?
A. I do not remember now.
Q. Had you ever seen this hand holt before?
A. No sir.
Q. How do you know to tell the jury it stuck out 6 or 7 inches?
A. I had seen them on other tenders.
Q. I am asking you about this one?
A. They all had that I ever knowed.
143 Q. If I understand you you do not know how this was before that?
A. No sir.

Redirect examination:

Q. Where was this hand hold bent with reference to the side of the engine the glass was broken out?
A. On the same side.
Q. Do you know Mr. Town the conductor of the yard?
A. Yes sir.

Q. Where was he when you went to look in the cab and engine?
A. He went down there with me.

ELI CAIN, being duly sworn as a witness for the plaintiff, testified as follows:

Direct examination.

J. M. Robsion:

Q. Where do you live?
A. Two and a half miles north of Corbin.
Q. Did you know Ed Parker in his life time?
A. No sir.
Q. Where were you working on the 30th day of June and 1st of July, 1913?
A. Corbin yards.
Q. What were you doing?
A. Oiling cars.
Q. Did you learn or get information about Mr. Parker being killed at Middlesboro?
A. Yes sir.
Q. Did anyone point out the caboose to you that he was struck by that night?

Defendant objects; overruled; defendant excepts.

144 A. Yes sir.
Q. Who did that?

Defendant objects; overruled; defendant excepts.

A. Well 3 or 4 or 5, something like that; I do not know as I could name all their names.
Q. Name those you do remember?

Defendant objects; overruled; defendant excepts.

A. Jim Campbell, Pete Scalf, Ed Sexton and Scy Banks.
Q. Where was the caboose when it was pointed out to you?
A. Sitting on the siding, somewhere between that called the south-bound and Middlesboro yard.
Q. What town or place, where?
A. Corbin.
Q. On whose railroad yards?
A. I suppose on the L. & N.
Q. What were you doing at that time?
A. That was the place we always staid when we had nothing to do.
Q. What work were you doing there?
A. Oiling cars.
Q. For what company?
A. L. & N.
Q. Now what position did Mr. Scalf and Mr. Sexton occupy with the Company at that time, at the time they pointed out this to you?
A. Scalf was inspector.

Q. Inspector of what?
A. Freight cars.
Q. For what company?
145 A. L. & N.
Q. What was Mr. Sexton doing?
A. Track car oiler.
Q. For what company?
A. L. & N.
Q. From what division of the L. & N. Railroad had that caboose come?

Defendant objects; overruled; defendant excepts.

A. C. V.
Q. What do you mean by "C. V."?
A. Well the Railroad here is cut up into divisions, some C. V. and goes by different names.
Q. What is the "C. V."?
A. Cumberland Valley I suppose.
Q. Where does the Cumberland Valley extend?
A. Which way north or south?
Q. South I reckon.
A. Corbin.
Q. Where does it go to from Corbin?
A. I could not tell you.
Q. What I am trying to find out, whether it extends from Corbin to Middlesboro?
A. I suppose it does.
Q. Describe to the jury what you saw on and about this caboose?

Defendant objects; overruled; defendant excepts.

A. I saw some blood on the caboose.
Q. What else?
Defendant objects; overruled; defendant excepts.
A. Saw some blood and something like meat or something like that.
Q. Did you see anything else besides blood and flesh?
Defendant objects; overruled; defendant excepts.

A. I do not remember as I did.
146 Q. For the purpose of refreshing your recollection, did you see any hair on the caboose where you saw this blood and flesh?

Defendant objects; overruled; defendant excepts.

A. Yes, sir, I saw some hair.
Q. Tell the jury whether or not the caboose was injured in anyway?

Defendant objects; overruled; defendant excepts.

A. Well it was scraped on the side. Had some splinters, was torn off.
Q. How large were the splinters that were torn off?

A. I do not remember; as I remember I pulled one off and got a splinter to scrape some blood off.

Q. Where was the splinter with reference to the blood and hair and flesh?

Defendant objects; overruled; defendant excepts.

A. Between where the blood was and the end of the car.
Q. You mean on a line with it?
A. Yes, sir.
Q. What railroad did this caboose belong to?
A. L. & N.

Cross-examination.

By H. H. Owens:

Q. What work are you doing now?
A. Farming.
Q. How long have you been farming?
A. Been farming since the 4th of July.
Q. Where do you live?
A. Two and a half mile- north of Corbin.
Q. How long have you been here as a witness?
A. Six days.
147 Q. To whom did you first tell what you are now telling?
A. I do not remember.
Q. Did you ever tell it to anybody before?
A. I talked it every since it was done I suppose.
Q. Tell us some of them.
A. I do not know; I can not remember any certain one.
Q. What color was this caboose, blue or green?
A. I do not remember the color of it.
Q. Give us your idea; you were looking at it and taking a splinter off of it?
A. As well as I remember it was red.
Q. What color red?

Plaintiff objects; sustained.

Q. When was this?
A. I am not sure when it was; last of June or 1st of July, somewhere, I disremember.
Q. 1912?
A. Yes, sir, 1913.
Q. How did you happen to be looking at that?
A. Saw other fellows looking at it.
Q. You say this fellow Banks was there?
A. Yes, sir.
Q. Tell the jury whether or not he saw this splinter on the middle of the car.
A. I could not tell.
Q. Was he there with you?
A. There were several around.
Q. Was Sexton there?

A. Yes, sir.

Q. Tell the jury whether or not he saw this splinter about the middle of the car.

A. I could not tell whether he did or not.

148 Q. Are you not mistaken about that? Was not the only mark that was on that caboose that you were looking at, simply two or three little marks on the end of the caboose?

A. I got splinters off the car.

Q. How far from the end?

A. Oh, it must have been a foot and a half or two feet; something like that.

Q. Were those splinters that come out of that block run lengthwise or up and down?

A. Up and down.

Q. What kind of wood was that?

A. I do not know what kind.

Q. You saw the splinter?

A. I did not pay any attention or enough to see what kind of wood.

Q. Could you not tell by looking?

A. I was not interested in it that much.

Q. You do not know where this caboose had come from?

A. No sir nothing more than it come off that division.

Q. You do not know.

A. There is where they kept the cabooses at that place of that division.

Q. Did you ever handle the cabooses?

A. No, sir.

Q. Switch them in or out?

A. (No answer.)

Q. Tell the jury whether or not that caboose was made out of a box car or a regular standard caboose?

149 A. I do not remember anything about it.

Q. What size was it?

A. I disremember that.

Q. Big or little one?

A. I do not remember what size.

Q. Was this scraping on the right or left side?

A. On the right.

Q. As you look which way?

A. That way (indicating).

Q. Toward Corbin?

A. Yes, sir, as well as I remember it was on the right.

Q. As you looked north?

A. (No answer.)

Q. Two or three feet from the front end as you look north?

A. About a foot and a half.

Q. A foot and a half from the front end as you look north and on the right side?

A. Yes, sir, as well as I remember it was on the right.

Q. Are you not mistaken. Were they not on the left side and near the head end as you look north?

A. They were on the front end.
Q. You are sure of it?
A. Yes, sir.

Redirect examination:

Q. You are telling about the way it set in the yards?
A. Yes, sir, how it set in the yards when I saw it.
Q. You do not know how far in the middle?
A. No, sir.

150 Recross-examination:

Q. You know which is the front end and which is the hind end of the caboose?
A. I think they are both the same.

At this point, the plaintiff closed his case in chief.

At the conclusion of all the evidence offered on the trial of this case by the plaintiff, came defendant and moved the court to instruct the jury to find and return a verdict for the defendant company; which motion the court overruled, to which ruling of the court the defendant excepted.

Thereupon, the defendant offered the following testimony on its behalf:

P. L. WILSON, being duly sworn as a witness for the defendant, testified as follows:

Direct examination:

Q. Where do you live?
A. Middlesboro, Kentucky.
Q. In what business are you engaged?
A. Engineer.
Q. For what company?
A. L. & N. Company.
Q. Did you know Ed Parker in his life time?
A. Yes, sir.
Q. Do you know when he was killed?
A. Yes, sir.
151 Q. What was he doing then?
A. He was locomotive fireman.
Q. Where?
A. In Middlesboro yards.
Q. For what Company?
A. L. & N.
Q. Who was engineer on that engine?
A. I was.
Q. How long had Ed Parker to your knowledge been working on the yards at Middlesboro?
A. About two weeks.
Q. How long had you been there?
A. I had been there off and on since 1910.

Q. Had you worked there all the time Parker had worked on the yard?

A. Yes, sir.

Q. And you say that was about two weeks?

A. Yes, sir.

Q. When did you first see him when he came to take work on the yards since he first began?

A. When he first taken work he came and reported — work at the place where we take charge of the engine; it is there on the yard.

Q. What time did the yard crew work night or day?

A. Night.

Q. About what time did you begin work?

A. 6:30 in the evening.

Q. Tell the jury whether or not you had any conversation with Parker at the time he came and reported for work as fireman on an engine in the yards crew with reference to his duties?

Plaintiff objects; overruled; plaintiff excepts.

A. The first night?

Q. Yes?

152 A. Yes, sir.

Q. Tell the jury what conversation you had with him?

A. I cautioned him about his duties in regard to that work.

Q. Tell the jury what you said to him?

A. I told Mr. Parker that he was required to keep awake and to lookout for signals at different points, and whatever he done to keep awake.

Q. Why were you telling him that?

Plaintiff objects; sustained; defendant excepts and avows that if the witness were permitted to answer he would truthfully state that it was because he had information that Parker was a person who would sleep while on duty, and that he came to that work with a "sleeping" record.

Q. Tell the jury why you said to him that it was necessary to keep awake while fireman on that engine?

Plaintiff objects; overruled; plaintiff excepts.

A. It was my duty to instruct him as me being in charge of matter mechanically pertaining to mechanical work.

Q. Describe to the jury Mr. Wilson the character of work that is done by the yard engine and yard crew?

A. Our duty is switching cars back and forth in yards and delivering them to whatever tracks is necessary in the line of our work.

Q. Tell the jury whether or not the running that engine did was on one run, a long or short period, or how it was, whether you shifted from different tracks and different cars rapidly?

A. It was very rapidly, yes sir; shift from one track back and forth to the tracks.

153 Q. Tell the jury whether or not every time you run in on a side track or out on the main track you had to receive signals to make the next move?

A. Yes, sir, had to receive a signal to make the next movement.

Q. Tell the jury whose duty it was to communicate to you signals from the brakeman when they were given the signal on the opposite side of the engine from you?

A. It is the fireman's duty.

Q. If I understand you then the flagman or the brakeman communicating the signal to the fireman to move the train back and forth or slowly or rapidly, and then he communicates that across to you?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes, sir.

Q. Tell the jury whether or not it was Mr. Parker's duty while fireman there on the engine in the yard, to communicate signals when they were given on his side of the engine, to you for movement of the trains and cars?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes, sir, it was his duty.

Q. How frequently, Mr. Wilson, did you receive signals, while on duty in the yards, there, at about what intervals?

A. I was subject to signals at all times.

Q. About what intervals did they come to you for the movement of your engine?

A. A whole lot depends upon that; you can always get signals at all times.

Q. What proportion of those signals is communicated to the fireman and from the fireman to you?

A. The signals are not generally given to the fireman except from points where they can not be seen from my side of the engine.

154 Q. In the yards about what proportion of these signals were communicated by the fireman to you?

Plaintiff objects; overruled; plaintiff excepts.

A. Something like twenty per cent.

Q. When had you first seen Parker on the night he was injured?

A. Seen him when he come on duty, 6:30; I seen him before we reported for work.

Q. Where?

A. At the restaurant, near where we took charge of our engine.

Q. About what time of night was it when he was injured?

A. It was five minutes past 10.

Q. Who was the first person to him?

A. I was the first person to him.

Q. Had he to your knowledge ever been asleep on duty while working in the yards prior to the time he was injured?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes, sir, he had been asleep before.

Q. Describe to the jury just what you had seen of Mr. Parker in that regard while fireman there on the yard engine?

Plaintiff objects; overruled; plaintiff excepts.

A. The night before while we were weighing cars at the north end of Middlesboro yards—we go quite slow weighing cars—and on account of the steam getting down to an unusual point, it struck me something was wrong, and I did not hear anything of him, and I got upon the seat and looked over the boiler—you could see him—and I seen him laying over there and without moving and I holloed to him; I walked across to him and shook him on the shoulder and says, "wake up boy."

Q. Tell the jury whether or not he was asleep.

155 A. It was after night; he was hanging loosely out of the window with his arm over there, whether he was asleep or laying there in a very still manner would be hard to say, but after I shook him he responded.

Q. Tell the jury whether or not he appeared to be roused up as if coming from sleep or if he was awake?

Plaintiff objects; overruled; plaintiff excepts.

A. He jumped up and jumped down and put in fire and turned the blower on.

Q. Describe his position to the jury as he was sitting there when you noticed him and called to him?

A. He was sitting on the seat, sitting astride the seat with his arm up this way, resting on the arm rest on the window in the cab. (Here witness indicates the position he occupied.)

Q. How did he have his head with reference to the window?

A. Laying across, something like upon his arm and his arm upon the window.

Q. Any part of his head out of the window?

A. It was sticking out some.

Q. Tell the jury whether or not on any other occasion while there on duty as fireman, you found him asleep?

Plaintiff objects; overruled; plaintiff excepts.

A. I never seen him asleep any other time.

Q. Tell the jury whether or not he made any statement to you about losing his cap while he was asleep any other time while on duty there?

Plaintiff objects; sustained; defendant excepts and avows that if the witness *were* permitted to answer he would truthfully state that two or three nights before he was killed he lost his cap and said that he had fallen asleep and his cap had fallen off and that he went around there for two or three hours without any cap.

Q. What time of the night was it when you went to him

156 while weighing cars and found him in the position you have just described to the jury on the night before he was killed?

A. Between 1 and 2 o'clock in the A. M.

Q. Tell the jury whether or not anything occurred there any time previous to that when Mr. Parker had lost his cap?

A. I do not understand the question the way you have put it.

Q. Tell the jury whether or not Mr. Wilson on any time before Mr. Parker was killed, and while on duty as fireman on the yard engine, he lost his cap or any part of his apparel and intimated to you and those who were working with the yard crew that he did that while he was asleep on the engine and while on duty?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes, sir, he lost his cap one night.
Q. Explain how that came about?

Plaintiff objects; overruled; plaintiff excepts.

A. He lost his cap.
Q. How long did he go around there without his cap and on duty?
A. Two or three hours.
Q. Tell the jury if you heard him say how came him to lost his cap?

Plaintiff objects; overruled; plaintiff excepts.

A. He said he was a sleep.
Q. Was he on the engine?
A. Yes, sir.
Q. Was that during working hours?
A. Yes, sir.
157 Q. How long before he was killed?
A. That was some nights before; it must have been,—I disremember but 3 or 4 nights.
Q. About what time of the night was it when you received information from him that he lost his cap?
A. I am not able to state what hour, but it was in the forepart of the night, before our noon hour.
Q. Do you have an hour what you call noon hour?
A. Yes, sir.
Q. That is midnight?
A. Yes, sir.
Q. What were you doing with your yard engine at the times you have spoken of Mr. Parker was asleep?

Plaintiff objects; sustained; defendant excepts, and avows that if the witness were permitted to answer, he would truthfully state that the yard crew was on duty and moving cars on the yard and as they did on all occasions while on duty.

Q. I believe you say Mr. Parker was injured about 10 o'clock at night?
A. 10:05.
Q. What had you and the engine crew done up to that time?
A. We had been constantly switching, shipping cars back and forth at different points on the yard.
Q. About how far would your engine run on a switch—in—one movement or while handling cars on the yard before it changes its tracks or changed to another track?
158 A. Ordinarily not over 150 feet to make a switch; although car turns it would be lots more than that.

Q. About how long would it take to move an engine and its equipments and cars, which you were handling in the yards that distance?

A. I do not know as I could hardly answer to any accuracy along that line, because a whole lot depends; you work according to signals, whether it is a signal indicating fast or slow; just at what it would be lots depends about that.

Q. Would it be a long time?

A. 2 or 3 minutes would be reasonable.

Q. When had you last seen Parker before he was injured?

A. I never taken any particular notice to him,—that is to speak to him or anything like that since about 8 o'clock that evening, although I would hear him and see him at other times but I never taken any particular notice to speak to him because I was busy.

Q. How long was it, if you remember, from the time he was injured that you had heard him and observed him on the other side of the engine from you at the fireman's place or putting coal into the fire box of the engine?

A. The best I remember between 15 and 20 minutes, probably 20.

Q. What was he doing?

A. Going down and throwing more coal in the engine.

Q. What occurred that attracted your attention that lead you to inquiry of Parker as to what he was doing, or attracted your attention to him at the time or soon before you learned that he

159 had been killed?

A. I do not know exactly what you are getting at.

Q. (Here the question was read to the witness by the Reporter.)

A. That is two questions in one.

Q. Take your time and answer both of them.

A. At the time he was killed I heard something like glass break in the cab window, and I heard a movement as if somebody was bursting glass or something or a piece of tin as if scraped a piece of tin, and I holloed to him, not knowing anything had actually happened, I says, "boys are you going to sit over there and get killed and not say anything about it",——.

Plaintiff objects:

(Witness continues:) and he did not respond, and I did not move but very few feet afterwards until I stopped the engine immediately and walked over to see about him, to see what was the matter.

Q. How did you get from *from* your position over to where Parker was?

A. I walked down through the cab through the deck up to where he was on the other side.

Q. Tell the jury in what position you found him when you went to his side of the engine?

A. I found him laying out of the window, cab window; he looked to be almost equally balanced; if you had started to push him either way he would have fell either direction; laying equally balanced across his stomach.

160 Q. The window sill was about the middle of his body?

A. Yes, sir.

Q. Where were his hands?
A. Hanging down loosely.
Q. On which side of the window?
A. Outside.
Q. How were his legs with reference to his side?
A. Sitting astride his seat like this (here witness sits astride a chair.)
Q. Describe the position in which you found his body as to whether it was straight out at the window or leaning to one side or the other?
A. It was straight out, just hanging straight out, as if he had been laying across that way, equally balanced across the window sill.
Q. Was more or less of his body in length outside or inside of the cab, not including his legs?
A. Sure, the heavier part of his body looks like it would have been outside.
Q. Where was your engine at that time with reference to the caboose on track No. 11?
161 A. It was about, I did not move over 10 feet at the largest after we passed that caboose going in track 10.
Q. Were you moving your engine backward or forward at that time?
A. Backward.
Q. What did you have in front of you and what did Parker have in front of him, looking the way the engine was moving?
A. You mean the direction in which we were going?
Q. Yes sir?
A. The car back of the engine.
Q. What car?
A. Box car.
Q. How long was that box car?
A. I could not say.
Q. Approximately?
A. There is different lengths in box cars.
Q. Tell what lengths there are?
A. Anywhere from 32 to 42.
Q. What was between the box car and the engine proper?
A. The headlight.
Q. Where was the tender?
A. Also the engine tender, yes sir.
Q. Did you have head lights on the rear end of your tender?
A. Yes sir.
Q. How long was the tender?
A. I never seen them measured but they look to be 15 feet.
Q. About how far was Parker's position in the cab from the fartherest end of the box car that you had in front of you and were moving?
A. 40 feet and possibly a little more.
162 Q. 15 foot cab and then 35 feet?
A. That would make 45 yes sir.

Q. How far did Parker sit from the coupling of the tender up in his cab?

A. That would amount to about 8 feet more.

Q. About what rate of speed were you moving?

A. About 3 miles per hour. About as fast as a man could walk.

Q. How far had you moved your engine and tender and box car in that movement?

A. About 100 feet I guess.

Q. Before you came to a stop?

A. Yes sir, before I came to a stop.

Q. What were Parker's duties as a fireman with reference to receiving or giving signals?

Plaintiff objects; overruled; plaintiff excepts.

A. His duties was to keep a constant lookout for signals at all times.

Q. What does he do when he receives signals?

A. Transfer them to me by word of mouth.

Q. What kind of night was this?

A. I would not say a dark night, although the moon was not shining; it was a star light night.

Q. Tell the jury whether or not there was anything to have prevented Mr. Parker from seeing that caboose standing on track 11 toward which your box car, tender and engine were moving, if he had been looking out in that direction?

A. Nothing between him and the box car that would have prevented him from seeing it.

Q. In which direction should a fireman and engineer be looking when the engine is moving?

A. The direction you are moving.

Q. What did you do with Parker's body after you went to him?

163 A. We carried it off out of his position down to the engine cab and he was bleeding freely, and I thought to get him in position so he could bleed freely I thought it would be better, and I put him half way out of the cab and laid his feet in it and got out with his head and give it a downward elevation until I could get help.

Q. Where were you when the first person came to you to — Parker?

A. I was standing on the ground holding him.

Q. On the ground?

A. No sir, not at the first. I called the colored brakeman and he come but he did not assist me before I got on the ground; I dragged him out and held him at that elevation before any other assistance come.

Q. Where was you when the colored brakeman came to you?

A. I was standing up in front of the boiler where you throw coal in with him standing there holding him.

Q. Holding Parker?

A. Yes sir.

Q. About what distance did you go from your place in the engine can around to where you found Parker the way you went?

A. I do not know exactly what the distance might be; about 10 feet you might say, making the circle around probably more and probably less.

Q. Where was your proper place on the engine while it was in movement?

A. On the right hand side of it.

164 Q. Tell the jury whether or not you were in that position at that time?

A. Yes sir.

Q. Tell the jury the condition of your engine and its equipment at that time?

A. The engine and equipments were in perfect condition so far as I know.

Q. I believe that you say that Parker's position, as fireman, was on the opposite side of the engine from you,—the boiler?

A. Yes sir.

Q. Tell the jury where the part of the engine extends up in the cab between you and the fireman?

A. The boiler between me and him that extends up there.

Q. Tell the jury whether or not when you are in your position and the fireman is in his position, you can see him while sitting?

A. Not unless you get upon something and look over; that boiler was a pretty high one.

Q. Tell the jury whether or not when you were in that position it placed you on the same side of the engine and tender or the opposite side from this caboose on track 11?

A. Yes sir. I was on the opposite side of where it was.

Q. On which side with reference to the caboose was Parker?

A. Parker was on the side that the caboose was on, on the left side of the engine.

165 Cross-examination:

Q. In what business are you now engaged for the L. & N.?

A. I am still engineer?

Q. Where?

A. Work at Corbin now.

Q. On what train?

A. I am in extra service; on any train they call me for.

Q. This caboose you spoke about was attached to the made up train was it?

A. Yes sir.

Q. What was the number of that train?

A. It was what they called 86. It was a local anyway.

Q. It was a local freight train that run from Middlesboro to Corbin?

A. Yes sir.

Q. Now you spoke about you being on the opposite side from that caboose. That is at the time you passed it and struck it?

A. I was on the opposite side.
Q. Was not that caboose and 86 train on what they call No. 11 lead track?
A. We were going in No. 10 and it was setting on 11, and it was on the opposite side of where the caboose was.
Q. That when you hit it?
A. Yes sir.
Q. When you came down 11 track you were on the same track that the caboose was, was you not?
A. No sir.
Q. When you come down 11 lead track?
A. You could see, yes, sir, and know it was switching but the switch was thrown to 10.

166 Q. When you are above No. 10?
A. We are above 11 too.

Q. You could look straight down that track and see that caboose?
A. Yes sir.
Q. What was your duty to look?
A. I was looking for signals.
Q. It was your duty to look down the track and see the caboose?
A. No, that is not my duty.
Q. Was not your duty?
A. No sir.
Q. You mean to tell the jury, as engineer, holding and controlling that engine, that you did not have to look ahead and see whether anything was on the track?

Defendant objects; overruled; defendant excepts.

A. It was all on the same track; my duty is to look out for all signals.
Q. Just look for your signals?
A. Yes sir.
Q. Don't have to look out for cars?
A. If I can see them I look out for them.
Q. Let's get at this. This caboose was on No. 11?
A. Yes sir.
Q. It is not the lead track running off from that?
A. Yes sir.

167 Q. When you are up here about track 9, switching 9, and going toward track 10, could you not look down here and see this caboose that you run into?
A. That might be on that side of the engine and I could not see it.
Q. Is it not straight out there?
A. Yes sir.
Q. Could you not look straight ahead and see the caboose?
A. I did not do it because there was a car between me and it.
Q. That same car was between Ed Parker and that caboose when he was on the lead track?
A. Yes sir.
Q. That light you saw was in the engine it was as close to you as it was to Parker was it?

A. Yes sir, I guess so.
Q. How big was the car that was behind the engine that you were backing up with?
A. Box car.
Q. How high was it?
A. I do not know how high box cars are.
Q. Go up high enough to be higher than a man in the cab?
A. Yes sir.
Q. You did not have anything to do as engineer, except to work levers and look out?
A. Obey signals.
Q. Watch for signals?
A. Yes sir.
Q. You kept your hand on the lever and started it and stopped it and regulated the rate and speed of the train?
168 A. Yes sir.
Q. Parker was not where he was handling the lever?
A. No sir.
Q. It was not his duty to handle it?
A. No sir.
Q. At times he had to get down and fire?
A. Yes sir.
Q. Kept up steam and kept coal in there?
A. Yes sir.
Q. Is this not it—you are the man who was to look out and watch all the time for signals?
A. I am the man, sir.
Q. Whenever young Mr. Parker was given a signal he transferred it to you?
A. Yes sir.
Q. When he did so he holloed it over the boiler so you could hear?
A. Over the boiler.
Q. When you were moving that train before he was killed there was nobody there offering to signal?
A. No.
Q. The only signals being given was on your side?
A. Yes sir
Q. And given in a place where Parker could not see?
A. He could see if they was given.
Q. Where they were given to you that night, they were not given where Parker could see them, were they?
A. No sir.
Q. Who was the man that was over Parker that controlled him and directed him in his work on that engine?

Defendant objects; overruled; defendant excepts.

169 A. He was subject to my instructions pertaining to mechanical work.
Q. That is pertaining to his work on that engine?
A. Yes sir

Q. Who was over you and Parker and all of you, if any one, on that yard?

A. Pertaining to that yard work the yard foreman.

Q. Who was that?

A. Mr. Town.

Q. Did you have any right to switch or move a single car on that yard without the direction and orders of Mr. Town?

A. Yes sir.

Q. Tell us where you moved cars without his orders?

A. You go by signals in things like that.

Q. But what I mean he tells which car to get and where to place the car?

A. He is the man who is ahead of the whole thing.

Q. Tell the jury whether or not any of you have a right to take any car out of one switch and put it in another or change or move the cars at all except under the direction of Mr. Town?

A. No sir.

Q. Did you that night have any right to put those cars or move your engine and put those cars that made up train 86 and put that caboose in there except under the orders of Mr. Town?

A. Yes sir, I had a right to.

Q. Did you do that?

A. Yes sir.

Q. Without his order?

170 A. Yes sir.

Q. Put them in there without his direction?

A. I do not know whether he give that direction or not, but anyway the direction was given the other employes and I obeyed their signals the same as his.

Q. Who has the switch list there.

A. Mr. Town.

Q. What has the switch list on it?

A. Got instructions and directions for our work.

Q. Is that switch list printed out or written out?

A. Written out.

Q. Does that switch list set out and provide what cars are to be switched and where they are to be switched to?

Defendant objects; overruled; defendant excepts.

A. Yes sir.

Q. Mr. Town gets these orders and gives the signals to persons and he has other persons there to assist him, is that right?

A. That is right.

Q. Who did he have there assisting him to give signals?

A. Two brakemen.

Q. What was their names?

A. George Tobias and John Smith.

Q. Did these brakeman have any right to give you any signal or direction for you to move any car, switch out from one place putting it another without instructions from Mr. Town?

Defendant objects; overruled; defendant excepts.

171 A. I would hardly think so.

Q. So that you tell the jury that these cars that *may* up train 86 and the caboose that were put on track 11 were all put in there at the order and instructions of Mr. Town?

Defendant objects; overruled; defendant excepts.

A. Yes, sir.

Q. Who gave the orders and instruction to put this car in No. 10?

A. I do not know.

Q. When did you first learn you had to put one in No. 10?

A. I did not know they were going to put one in there until I saw the signal for that movement.

Q. Did you put any in from 9?

A. I do not remember.

Q. Where were you when you got the signal to put one in 10?

A. Up near 7 or 8, 5 or 6, 7 or 8.

Q. What sort of a signal was you given?

A. I did not know what track to put it.

Q. How did you know you were going out 10?

A. I did not know.

Q. When?

A. Not until we stopped, and then we were in No. 10; I did not know where we were going; I was simply obeying back-up signals; If I had have been going down 11 I would have been going.

Q. You was engineer and had nothing to do with the direction or movement of those cars, there, and all you had to do was just to pull the lever of your engine and start it and stop it according to signals?

A. That is all.

172 Q. When did you find out you were going into 10?

A. I did not know we were in No. 10 until after the accident.

Q. And that the first you knew of it?

A. Yes sir.

Q. Could you see?

A. Yes sir.

Q. Didn't you see when you were in 10 and know that you were going into No. 10?

A. You can not tell which track you were going into until after you get into it; after you get in you see it is not in 9 but you know it is 10.

Q. You could see it was not 8 then?

A. Yes sir.

Q. You did not know you were in track 10 until after the accident occurred?

A. No sir.

Q. Were you asleep?

A. Not by any means.

Q. Was it not light enough for you to see what track you were going into?

A. Yes sir, but after you pass No. 9 you could not tell you were going into 10.

Q. After you pass 10 you could not tell but what you were going into 11? You would have to first go up 9 before you could tell you were going to 11?

A. Yes sir.

Q. How far would you then be from this caboose?

A. You would be 75 feet, something like that.

Q. And I believe you say the first noise you heard was glass breaking or tin rattling?

A. The best of my knowledge it was tin scraping.

173 Q. Was there any tin on that engine?

A. Some engines.

Q. That one?

A. No sir, no tin on that engine.

Q. Was there not a little piece of tin?

A. Not that I seen.

Q. Was it not rubbed off?

A. It might have been.

Q. Don't you know?

A. No sir.

Q. Don't you know there was no tin about that caboose or about that box car, and no tin there to rattle, except that little piece of tin over the cab?

A. No, sir, there is a little piece of tin there over the caboose over the window.

Q. Did you look at it after the accident?

A. No sir.

Q. On your side of the engine after the accident you noticed a piece of tin over the window of the cab?

A. I knowed it was there; they are supposed to be there, some times they are not there.

Q. How wide are they?

A. Six inches.

Q. When you looked on the fireman's side after the accident, was there any tin?

A. I never noticed.

Q. Do you tell the jury there was any?

A. I am not positive.

174 Q. Don't you know whether there was — no?

A. I do not know whether there was or was not.

Q. Didn't you tell me in my office when I was asking about this case, they rubbed that tin off?

Defendant objects; overruled; defendant excepts.

A. No sir, I said I heard a piece of tin scrape.

Q. How long after you heard the piece of tin scrape until you discovered he was killed?

A. It was all pretty quick together.

Q. So when you heard the tin scraping you said, "boy are you going to sit over there and get killed?"

A. That is what I said.

Q. And then you went and found he was killed?

A. After I heard the tin scraping, along close to the same time, it was altogether. I heard the glass breaking and that attracted my attention that something was unusual and that is when I hollowed to him.

Q. What did the glass break in?

A. In the engine cab.

Q. On Parker's side?

A. Yes sir.

Q. Do you tell the jury that there was any tin on that cab? Not on that cab, but on the caboose?

A. I do not know whether there was or was not but most of these cabooses have got it.

Q. That one?

A. I do not know about that one.

Q. How close together was this tin rattling that you heard and glass breaking?

A. It was all mighty close together.

175 Q. So I believe when you got around there Mr. Parker was lying out of the window about half way, about balanced?

A. Yes sir, about balanced out of the window.

Q. How high is his seat, his cab seat from the bottom of the window?

A. From his seat?

Q. Yes sir?

A. I do not know the height, but is fixed for a man to lay this way (indicating) and rest his arm on it.

Q. A man sitting down and rest his arm upon the window?

A. Yes sir.

Q. That would put it 2 feet above his seat in the cab?

A. I think 2 feet would be a little bit, but something like that.

Q. He was sitting down?

A. He was in that position but in more of a hanging,——

Q. But didn't you tell the jury a while ago he was sitting down when you got down there?

Defendant objects; overruled; defendant excepts.

A. No sir.

Q. My question is, did you tell the jury a while ago in answer to Mr. Owens' question he was sitting down?

A. I said he was astride the seat.

Q. A straddle the seat and hanging out of the window?

A. Had the seat between his legs, and was sitting there almost equally balanced; he was off the seat more than he was on it.

Q. Tell the jury how he got up a straddle of the seat and as much on it as off of it and hanging half-way out of that window?

176 Defendant objects; overruled; defendant excepts.

A. His feet was hanging across the seat—the seat was between his legs.

Q. Had the caboose and cab caught him and pulled him around the side of the car?

A. It might have done it.

Q. You do not tell the jury he was hanging out of the window when the cars run together?

A. I do not know where he was when they run together; that was where he was when I found him.

Q. That was after you heard the glass breaking and tin rattling?

A. Yes sir.

Q. You saw him after that?

A. Yes sir.

Q. Describe that place where the fireman sits in the cab to the engine, how wide and how long it is?

A. It is along by the side of the boiler, 2 or 3 feet wide, and has a window and also a seat up there for the fireman to sit on, and the seat generally is fastened against the wall with a prop or something so it can be raised up and also to fasten against the side of the window; you can raise it up and it is a seat, and knock a lock out from under it and it is not a seat.

Q. Which way was his face?

A. Outward.

Q. Looking straight out?

A. No. Of course his head was out and his face down; he was hanging out of the window, half inside and head and face outside across the window sill.

Q. How far was he sticking out from the window?

177 A. He was the thickness of his body stick*out* out; he was limber.

Q. Hanging with his head down?

A. Yes sir.

Q. I thought you told Mr. Owens and Black he was laying with his hands out and face out and looking straight out?

A. No sir; I said he was equally balanced across his stomach there across the window sill; half inside and head hanging outside.

Q. I believe you say 15 minutes before that he was down firing the engine?

A. 15 or 20 and probably 20 minutes.

Q. How can you put it 20?

A. Only guessing at it.

Q. It might have only been 5?

A. I could judge better than that.

Q. You had rather guess beyond 20 than under 20?

A. No.

Q. Don't you give it that to give the idea he had time to go to sleep? Is that not the reason why you give it that?

Defendant objects; overruled; defendant excepts.

A. No sir.

Q. Did you notice your watch at the time he did the firing?

A. No sir.

Q. Did you notice your watch when he was killed?

A. Yes sir.
Q. You saw it then?
A. Yes sir.
178 Q. But of course you can not tell the jury exactly how long it was?
A. From the time I noticed him firing until he was killed?
Q. Yes sir?
A. No, sir, because I do not.
Q. Was he not killed between 7 and 8 o'clock?
A. No sir, 10:05.
Q. Was George Tobias there?
A. He was.
Q. Was he the man who gave the signals?
A. Yes sir.
Q. He came up in the cab and helped you take the fellow out, didn't he?
A. No sir.
Q. When did he come to you?
A. He come to me immediately after I dragged him in the engine deck, called for him and he come along by and seen what had gone wrong and got scared and wouldn't help.
Q. Didn't you go up there in the cab and see this man Parker there sitting on the seat and didn't you have him under the arms and have him straight upon the seat and him sitting on the seat when Tobias come upon the cab where you were and you and him took him out?
A. No sir, I dragged him in the cab.
Q. Was you not in that position in the cab when Tobias came up there to you?

Defendant objects; overruled; defendant excepts.

A. No sir.
179 Q. Did he ever get up in the cab until you got Parker out, according to your way of looking at it?
A. I do not believe he did. One of the brakeman,—after we come out maybe I asked for water and one of them got ice water but I do not know which it was because I was kind*ly* excited at the time after it happened.
Q. Where was Town?
A. He was ahead on the engine about 100 feet.
Q. Had you seen Town down there about No. 11 or 9 and 10 tracks?
A. I had seen a lantern back and forth; you can not tell exactly who it was.
Q. You do not know which it was of the men that signalled to go into 10?
A. No sir, I knew it was one of the crew.
Q. At that time you did not know where Smith or Town or Tobias was?
A. I knowed it was one of the three. I could not tell at the moment which it was.

Q. When had Town got the switch instructions to switch this car into No. 10 that you had taken in there when this fellow was killed?

Defendant objects; overruled; defendant excepts.

A. I do not know.

Q. Did Parker get down on the ground and help switch any of those cars?

A. Not that I know of.

Q. Did Parker tell you about putting the caboose into No. 11 and cars?

Defendant objects; overruled; defendant excepts.

180 A. No sir. I do not know.

Q. I thought you said when I first asked the question you did not.

A. I do not know it.

Q. My question is, did Parker tell you about putting that caboose or any of those cars in No. 11?

A. No sir.

Q. Did Parker tell you about switching this car here into No. 10 that was *to* being switched when he was killed?

A. No sir.

Q. Did he tell you or give you instruction about putting the one in No. 9 just before that?

A. No sir.

Q. Where was the man that was giving you instruction signals to go into No. 10?

A. He was back of me in the direction I was moving.

Q. Was he on the car or ground?

A. The best of my remembrance he was hanging on the side of the car.

Q. What was he doing?

A. Giving me back-up signals.

Q. On the same side you were?

A. Yes sir.

Q. Where he was located on the side of the car giving you signals, tell the jury whether or not Mr. Parker, the fireman, could see it?

A. He could not see his signals, no sir.

Q. Was any other persons giving signals at that particular time?

A. There was a signal further down in the yard.

Q. Which way?

181 A. In the direction we were moving.

Q. On no 10?

A. Yes, sir.

Q. What, if anything, would be between that and Mr. Parker?

A. Yes, sir, the man that was giving the signal; no doubt he could see; I could not.

Q. What was between the man who gave the signal and Parker?

A. Box car.

Q. And the engine also was it not?

A. The engine was not gone; just the car between; he was on the engine.

Q. And with him on the right side of the engine and it backing and some person in 10 on the left hand side of the engine giving the signal, the engine and this boiler would be between them?

A. Yes sir, the boiler was between him and me.

Q. The boiler was between him and all the signals on your side?

A. Yes sir, the engine tank would.

Q. Let's assume that this place in here (indicating) was Parker's part of the cab; and say here (indicating) is your part of the cab; this boiler was between you and him?

A. Yes sir.

Q. How high was the boiler from the floor?

A. It was pretty high; I do not know but you can not see it you generally have to get upon something before you can see where he was.

Q. Take from the floor of the platform where your seat is on and where Parker's seat is on, tell the jury how high it is from
182 there to the top of this boiler?

A. About 5 feet.

Q. How wide is the boiler?

A. I do not know, something like 5 feet.

Q. Did you expect to take that car into 10 and let it remain in there?

A. I did not know anything about what we were going to do.

Q. This moving you have stated about was different cars that were on the switch yard?

A. Yes sir.

Q. Did you see any wounds on Mr. Parker?

A. Yes sir.

Q. Where?

A. On his face and on around the side of his head.

Q. Do you remember which side?

A. No sir, because it was bloody and you could not tell the exact spots the wounds were.

Q. You don't tell the jury that Parker was asleep when he was killed this night?

A. I did not say he was asleep when he was killed.

Q. That other night you say he was over there and rather still and you touched him and he jumped up and fired his engine, do you tell the jury he was asleep?

A. They can judge for themselves.

Q. Do you tell the jury he was asleep?

By the Court: "Do you know whether or not he was?

A. No sir.

183 Q. Now Mr. Wilson, is this not the way of it; that the company was blaming you and Mr. Town and these two other fellows, who gave the signal, for killing this man, and didn't you all then claim he was asleep in order to save yourselves?

A. They were not blaming me in the least.

Q. How much did the fireman get on that yard?

A. $2.34.

Q. Was it not $2.46?

A. It was $2.47 when you used a different sort of engine the engine used for the yard service was $2.34.

Q. Did you have on that night a regular yard engine?

A. No sir.

Q. What kind did you have?

A. Road engine.

Q. What was the number of it?

A. #909.

Q. That was not equipped like yard engines?

A. No sir.

Q. You say the fireman got different prices to work on these and yard engines?

A. Yes, sir, a few cents difference.

Q. He got $2.34 to work on the regular yard engine. Q. And $2.46 to work on the engine like he was working on that night?

A. Yes sir.

Q. How long had you used that sort of engine?

A. Used it from 6:30 until 10 that night.

Q. And was that not a dark night?

184 A. No, it was a star light night.

Q. Any moon shining?

A. No moon shining.

Q. How long was it after these trains collided there and Mr. Parker was killed, until Town came down?

A. Very few minutes, I do not know the number; as soon as we called for assistance they come running from the directions they were in.

Q. How do you know you had to take orders from Mr. Town and shift cars according to his direction?

A. He was our yard foreman.

Q. I mean from whom did you get the instructions that you had to do it according to Mr. Town?

Defendant objects; overruled; defendant excepts.

A. Did not get it from any one except it was custonary rules that you obey the instructions from the yard foreman.

Q. Did Mr. Parker have any right there to control your engine in any way or the movement of it to run or direct you how to run it?

A. Yes sir, he had a right to tell me when signals was given.

Q. I have not asked you that; did he have any right to work the lever and start it or stop it?

A. Not while I was moving it; it was not necessary while I was there.

Q. You mean where Mr. Town would give him a signal he would simply transfer it to you?

A. That is the idea.

185 Q. He did not have the right to control your engine in anyway did he?

A. No sir.

Q. Could he give you any instructions or direction other than what had been communicated to him from the yard foreman?

A. No sir.

Redirect examination.

By H. H. Owens:

Q. The attorney for plaintiff seems to confuse the instructions and signals. If I understand you the engine was moved entirely by signals received from some person down in the yard?

A. Yes sir.

Q. No person gave you any instructions with reference to the movement the engine was to make?

A. No instructions other than signals.

Q. Whatever took place between Town and the Conductor and the two brakemen with reference to the placing of the cars you knew nothing about it?

A. Never knew anything about it at all.

Q. Your duty was simply to move cars there backward and forward as signals came to you to move backward or forward?

A. That is the idea; I considered it none of my business what they did, so I obeyed their signals.

Q. You did not know when making a particular movement where that car was carried but simply knew it was going back or forward.

A. I knew it was going back but I did not know where.

Q. And upon what track you did not know.

A. No sir.

186 Q. You were asked about seeing the caboose, about as to whether you could see the caboose sitting upon track 11 while you were backing on the lead running to 9 and 10 and 11. If I understand you that caboose with the rest of the cars in there, all of which was down beyond track 10?

A. That is right.

Q. And whether that caboose was sufficiently far ahead with the car going in track 10—to clear, you could not see when looking directly toward that caboose?

A. No sir, I could not see it.

Q. When the car and engine turned in on track 10 that left the fireman on the side directly next to the end of the caboose?

A. That is right.

Q. And while you were on the opposite side of the engine and away from the end of the caboose?

A. That would be a car between me and the caboose; I could not see it.

Q. While in that position, was there anything at all to prevent the fireman, if he was looking in the direction in which you were moving, after the car and engine turned into 10, was there anything at all to prevent him from telling that the end of the caboose was near him and he was approaching it?

A. Nothing.

Q. Is it not a fact, Mr. Wilson, if he had been walking and looking in that direction that he could have seen that caboose?

Plaintiff objects; overruled; plaintiff excepts.

A. If I had been in his position I could have seen it.

187 Q. Could not any person in that position, looking in the direction in which the train was moving, have seen the end of that caboose?

A. Yes sir.

Q. Tell the jury whether or not this glass that you spoke of hearing break, was broken by Mr. Parker's body after it had been caught by the end of the caboose, or whether there was some instrument that was jobbing from the end of the caboose and broke the glass?

A. I could not say it, because no part of his body was in about the glass when I found him, and whether his head struck it or he pressed himself back into it I could not make that statement.

Q. Tell the jury whether or not there was any indication that any object off the caboose had jobbed in and broke any glass, or whether it indicated it had been broken by his body?

Plaintiff objects; overruled; plaintiff excepts.

A. The marker off the caboose was gone.

Q. That had been broke off?

A. Yes sir.

Q. You were asked if the equipment on this engine were different from the equipment on a yard engine. Tell the jury what the difference was?

A. The only difference was boards on the front end of the engine where the brakeman stands, what they call foot boards.

Q. That was down next to the ground?

A. Yes sir.

188 Q. That had to do greatly with the convenience of the brakeman riding from one place to another?

A. Yes sir.

Q. That had nothing to do with Parker's portion of the engine?

A. No sir that would not have made any difference with him.

Q. In fact he could not have told it unless he had gone around there?

A. No sir.

Recross-examination:

Q. Tell the jury why they paid you more for working on that engine than the other, the fireman?

Defendant objects; overruled; defendant excepts.

A. I do not know; that was an agreement between the engineers and company for more, perhaps.

Q. Mr. Wilson, when you *are* going down this lead track toward the caboose, was the caboose not just as fair a view to you as to Parker?

A. No.

Q. When you were going toward it here?

Defendant objects; overruled; defendant excepts.

A. No sir, it was not.

Q. Whether or not you could see it would depend upon the tracks?
A. To a big extent.
Q. With that track there and the noise there, you do not know whether Mr. Parker said anything to you or not, do you?
A. I never heard him say anything.
Q. Where this glass was broken that you speak of seeing, was there not blood and flesh on it?
A. There was blood about the side of the engine cab.
Q. Was there not blood on the glass?
A. The glass was scattered inside the cab.
189 Q. I mean the piece of glass that remained in the cab?
A. I could not say there was or was not because I did not use that any more; I could not tell in regard to the blood on the glass.
Q. You knew nothing about the instructions of the movements of the cars except signals. That is all Parker knew about it?
A. That is all.
Q. When you were moving this particular car the signal was being given to you and not to Parker?

Defendant objects; sustained; plaintiff excepts.

Q. No signal given to Parker so far as you know when these particular car- was moving?

Defendant objects; overruled; defendant excepts.

A. I do not know whether there was or was not.
Q. Which was nearer to this caboose, the man that threw the switch that made the yard into 10, or the men on the end of the car or you or Parker?
A. The man who was close to the man who threw the switch was closer to it than we were.

Redirect examination:

Q. Do you know who threw that switch?
A. One of the brakeman, I do not — which.
Q. One of the two colored men?
A. Yes sir.

Recross-examination:

Q. You say both men threw it?
A. One of them.
Q. I thought you told the jury you did not know who done it?
A. I said a brakeman.
Q. Didn't you say it was one of those men, Town or the
190 two brakemen?
A. I told you Town was ahead of the engine 100 feet.
Q. Do you know how long the switch had been thrown at the time of the accident?
A. No sir.

W. R. TOWN, being duly sworn as a witness for the defendant, testified as follows:

Direct examination.

By H. H. Owens:

Q. Where do you reside?
A. I am now residing at Benham, Kentucky.
Q. In what county?
A. Harlan.
Q. Where were you born and reared?
A. In the state of Missouri.
Q. With what Company are you employed?.
A. The Louisville & Nashville Railroad Company.
Q. Did you know Ed Parker in his life time?
A. Yes sir.
Q. Where were you working at the time he came to his death?
A. Middlesboro yard.
Q. With what crew?
A. With Mr. Wilson and Mr. Parker was fireman, and a couple of colored fellows, Smith and Tobias.
Q. What did that crew do?
A. We were doing regular yard work.
Q. What were the duties of the yard crew, what work did they do?
A. Make up and turn by all regular trains and do the
191 necessary switching; some nights run two gangs, hauling and taking empty gongs.
Q. On what division is Middlesboro?
A. Cumberland Valley.
Q. Between what points does that division extend?
A. Corbin and Norton; Corbin on the W. & B. and Norton on Shenoa.
Q. Into what state does Shenoa run?
A. It don't get out of the state of Kentucky; Mingo runs out.
Q. Into what state does Mingo run?
A. Tennessee.
Q. Where is the Kentucky terminal on the Mingo branch?
A. Middlesboro.
Q. I believe you say it was the duty of the yard crew to on some occasions to take empties to Mingo?
A. Yes sir.
Q. In doing that into what states did you run?
A. Out of Kentucky into Tennessee.
Q. Through what states does the Louisville & Nashville Railroad Company line run on the C. V. Division?
A. Kentucky, Tennessee and Virginia.
Q. What connection did you have with the yard crew on the night Parker was killed?
A. Yard foreman and yard conductor.
Q. Of what train were you conductor?
A. Middlesboro switch engine yard crew.
192 Q. What position did Parker occupy with that crew?
A. Fireman.

Q. How long had he to your knowledge been working as fireman for the yard crew in Middlesboro prior to his injury?

A. About two weeks.

Q. Did you know him before that time?

A. No sir.

Q. Had you observed his performance of his duties prior to that time he was injured?

A. Yes sir.

Q. Tell the jury what his duties were as fireman on the yard engine?

A. To do the necessary firing of the engine, look out for all signals that should have happened to be given on his side of the engine.

Q. When he received a signal on his side of the engine what did he do with it?

A. Transmitted them to the engineer.

Q. State whether or not you had at any time previous to his injury observed any failure on his part to perform these duties in any way?

Plaintiff objects; overruled; plaintiff excepts.

A. About 20 minutes previous to his death I passed along by—I was on the ground under the engine cab—and from his appearance he was asleep, hanging out of the engine cab. I woke him up; I shone my lantern up in his face, he did not open his eyes and I yelled at him and told him he was subject to get killed that way.

193 Plaintiff objects to what he said to plaintiff, and moved the court to exclude the statement of this witness; which motion the court overruled; to which ruling of the court the plaintiff excepts.

Q. About what time of the night was it he was injured?

A. Something near 10 o'clock; I do not know the exact minute now.

Q. Describe the position which you observed him in about 20 minutes before he was injured, and how he was sitting?

A. There was a seat there similar to this I am sitting on, only it was fastened to the wall; an arm rest there and is put upon the wall; he was laying out that way (indicating) head hanging over that way (here indicates).

Q. How were his eyes?

A. They were closed.

Q. What did he do, if anything, when you flashed your lantern and spoke to him?

A. He did not make any move at all.

Q. What did he do when you spoke?

A. I told him to raise up, he straightened up and leaned against the boiler side of the cab.

Q. Before he straightened up, tell the jury whether or not any part of his head, face or arms extended beyond the window sill?

A. Yes, sir, head, shoulders and also his arms from elbows out.

Q. You mean outside of the window?

A. Outside of the cab. Yes sir.

Q. How soon after he was injured did you see him?

A. Not over two minutes.

194 Q. Where was his body?

A. The engineer had pulled it down out of where he first found it; he had him down in the deck of the engine, waiting for assistance to get him on the ground.

Q. What was your duties with reference to the switching that was to be done by the crew on the yard in Middlesboro?

A. I give instructions in regard to how the work was to be done and saw it was done.

Q. To whom did you show the instructions as to the movement of the cars?

A. I frequently showed all my instructions to the brakemen, previous to the work hour, I would get my list and show them and explain and tell how or the amount of work I had to do in the run of the night.

Q. What did your brakeman do with reference to the moving of the cars you directed them to move?

A. Go ahead and move them as I told them.

Q. How would they be moved?

A. If I wanted a car put in No. 5 or 10 or put on a train to go out of there, I would tell them to throw that car on track so and so.

Q. What would they do with the instructions you gave them as to whether they moved the cars and had somebody else to move them?

A. I let them see the work instructions.

Q. Would they do the moving of the cars or would the engineer or engine?

A. The engine moved the cars.

195 Q. When you gave them instructions to move the various cars in the yard, what would the brakeman do?

A. They give the engineer the necessary signal to make those movements.

Q. Tell the jury whether or not in performing that work the signals were communicated to the engineman and were frequently communicated through the fireman to him?

A. Numbers of times, yes sir. But I always made a point to give as many signals as possible on the engineer's side on account you could get better service, on account of him having to transfer them to the third party.

Q. What length movement on a switch would the engine make in the yard?

A. Oh, various distances. Possibly the caboose or car in one track, the engine itself would not move over 150; it depends upon the length of the cars and where I was taking them to.

Q. There was no long movements like run on the main line?

A. No sir.

Q. How do you know what work you were required to do on the night Parker was injured?

A. I received my switch list from the agent; it was all put on paper and he gave them to me and I was supposed to execute them.

Q. I show you some papers. Tell the jury whether or not you have that switch list that was given you on this particular night?

(Here witness is handed some papers, which he examined.)

196 A. There is 2, 3, 4, 5, 6, 7, and 8 of them. If you want to see the switch list I was working by that is it (indicating to one of the list).

Q. Do you know the switch list that you were working by at the time Parker was injured?

A. Yes sir.

Q. What work did you and the yard crew have to do and were you preparing to do at the time Parker was injured?

A. We were down, going in No. 10 to get out a merchandise car for 89, a full car for No. 4 track and an empty box car for No. 5, and also had hold of the box car I was taking off there with me that was to the Furnace Mills.

Q. A merchandise car for 89, what is that?

A. A South bound local freight train that leaves Middlesboro in the morning.

Q. Where does it go?

A. Middlesboro to Norton Virginia.

(At this point the defendant offers some records).

Q. Do you remember the number of the merchandise car that you were getting off that was to be put in train 89 running to Norton?

A. I do not like to make a sworn statement, it was M. C. 13406 or 13506, or 13306.

Q. Refer to your records if you have them, and tell the jury the exact number and name of the car for which you were going and when was it to be placed in train 98?

(Here witness looks at the records.)

A. M. C. 13908.

197 Q. Do you know of your own personal knowledge as to what that car had in it?

A. Had various articles; shipments of everything in it for points on the south end of the C. V. Division; at least that was my -memberance; it was a merchandise car.

Q. Did you see the way bills?

A. No sir, I did not handle the way bills.

Q. Of course you did not open the car.

A. No sir.

Q. Do you know it was a merchandise car for some point in Tennessee or Virginia?

A. Tennessee or Virginia.

Q. Where was that car that contained that merchandise destined for points in Virginia or Tennessee?

A. It was down some 12 or 15 car lengths down on track No. 10.

Q. The same crew with which your engine was moving, on the

same track on which your engine was moving at the time Parker was injured?

A. Yes sir.

Q. Tell the jury whether or not it was or was not part of the duties of the yard crew of which Parker was a member, to take and place this car containing this merchandise for Virginia and Tennessee on train 89 destined for these points?

A. Yes sir.

Q. Do you know from the billing or from your personal knowledge where this car had come from or in what train it came to Middlesboro?

A. It came to Middlesboro in train 89, the night previous to my handling.

198 Q. Between what points did Train 85 run?

A. From Corbin, Kentucky to Middlesboro, Kentucky.

Q. Where was "M. C. 13908" placed, in what train?

Plaintiff objects; overruled; plaintiff excepts.

A. Train 89.

Q. If I understand you, you went into track No. 10, and intended to move this car for train 89 at the time Mr. Parker was injured?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir.

Q. Tell the jury whether or not this car did go into train 89 that run between Middlesboro and Norton, Virginia?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir, I placed the car in train 89, whether it departed from Middlesboro on that date, I cannot say.

Q. Tell the jury whether or not taking this car from track 10 and placing it in train 89 was a part of the work assigned to you and the yard crew of which Parker was a member on the night on which Parker was injured?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir.

Q. Tell the jury whether or not that car was on the original switch list which you received at or prior to the time you and the other members of the crew went on duty that night?

A. Yes sir.

Q. At what times did you receive the orders for the switching or work that was to be done on the various nights?

A. Varied times; anywhere from 5 to 6 o'clock in the

199 evening.

Q. On the day that shipping was to be done that night?

A. Yes sir.

Q. And at what times did you receive the switch instructions on the night Parker was killed?

A. Somewhere between 5 and 6 o'clock that evening.

Cross-examination.

By J. M. Robsion:

Q. I believe that night you had made up a train in No. 11?
A. Yes sir.
Q. What was the number of that train?
A. 86.
Q. Did you put a caboose to it?
A. Yes sir.
Q. Under whose orders and direction was these cars and caboose put in 86?
A. Mine.
Q. And that was before Parker was killed?
A. Yes sir.
Q. At the time Parker was killed the engine was backing into 10 approaching a box car?
A. Yes sir.
Q. What box car was that?
A. It was an L. & N. empty going to J. R. Hoe, I believe it was consigned.
Q. That a place in Middlesboro?
A. Yes sir.
200 Q. In this state?
A. Yes sir.
Q. And where was this train going that was in 11, No. 86 train and caboose?
A. It was to go to Corbin the next morning.
Q. Middlesboro is a freight division point is it?
A. It is a sub-division for locals.
Q. Locals freights run between Middlesboro and Corbin, Ky.?
A. Yes sir.
Q. Freight locals that runs from Middlesboro to Norton Virginia?
A. Yes sir.
Q. And those two local divisions make up the C. V. Division?
A. Yes sir; Middlesboro is a subdivision.
Q. I notice this car you say 13908 M. C. on your card that you have introduced here, which you say was the instructions given you that night, and under another division of the car- it reads, under the head of the Division of destination, it reads "89"?
A. Yes sir.
Q. What does that mean?
A. That car goes on 89.
Q. So far as your crew was concerned and so far as Parker was concerned; if that was to be moved at all, it was to be moved from No. 10 to 89 train?
A. Yes sir.
201 Q. And that was its destination so far as your crew was concerned?
A. Yes sir.
Q. But that car was not moved that night before Parker was

killed? I mean car 13908, M. C. "89" it was not moved that night before Parker was killed?

A. No sir.

Q. So what you are talking about this car 13908 M. C. destination 89, tonnage 10, that was a car you moved after Parker was killed and put it into 89 train?

A. Yes sir.

Q. This car that was attached to the engine, where did you put it after Parker was killed?

A. I taken it along up in the morning after sometime between that time and time I was quitting next morning, taken it over to the furnace.

Q. That is in Middlesboro?

A. Yes sir.

Q. And near these yards?

A. Yes sir.

Q. How many cars were between it and the car you were moving for the local trade, there at Middlesboro, and this car 13908 M. C. 89?

A. 12 or 15; might have been that many I do not know the exact number.

Q. Did you have the number of any of the freight cars in No. 10?

A. I can take that list and give you the number of three.

Q. I want the number of these 12 or 15?

202 A. I cannot give them to you.

Q. Why can you not?

A. It is not on the switch list.

Q. And they were not to be moved at all?

A. Not by me, no sir.

Q. How were you to go about getting that freight car?

A. I was to couple to them and move that out and they went back in No. 10 and staid.

Q. Where was this other track you spoke about, this furnace main?

A. Over by the furnace.

Q. How did you get it from No. 10?

A. Went over on the track.

Q. I understand that, but what track did you go on?

A. Go up the main lead and come back in around from the pit track and come up the furnace main.

Q. Did you do any switching just before you went into 10?

A. Yes sir, we switched a number of cars.

Q. Did you put any in 9?

A. Yes sir.

Q. What car did you move just before this man was killed?

A. Shifted a car in No. 9; that is about the last move I remember.

Q. Did these switchmen on the yards, Smith and Tobias and Wilson and Parker have any right to move any car from one track to another without your instructions or directions?

A. No sir.

203 Q. Did they have a right to place any car at any particular point in the yards without your instructions and direction?

A. No sir, not unless they happened to notice and detect it was dangerous to the public, and they might in my absence place it for the benefit of the public.

Q. You were not absent?

A. No sir.

Q. You were on duty?

A. Yes sir.

Q. Who gave you instructions to have these cars in No. 11 and attach a caboose to it and make up train 89?

A. I received these instructions the same time I received those others; got them from the agent.

Q. Where are those instructions?

A. Here lies a bill of them, part of them. I do not know whether it is all or not.

Q. From whom did you get instructions to put this car in 10?

A. From the same place I got all the rest.

Q. Who is that?

A. Bailey, at Agent's office at Middlesboro.

Q. You were off and gone there that night and not looking after your business when this track No 11 was filled up there?

Defendant objects; overruled; defendant excepts.

A. No, not gone away; I had stepped across to ask about clearing the furnace main so we could go to the furnace.

Q. When out 11 was filled up?

A. No sir.

Q. You don't tell the jury you were there when train 86 was made up and caboose put in there?

A. I was there and was not there in a sense; I was very near, close; I was performing my regular duties.

Q. Was it your duty to see about them?

204 A. Yes sir.

Q. Tell the jury whether or not you did have these cars and that caboose put in there and if you were not there?

Defendant objects; overruled; defendant excepts.

A. I was not exactly on the spot; I do not know exactly how you want me to explain it; I was between 75 and 100 feet of them all the time.

Q. How many cars were put in 86?

A. I could not say, between 8 and 15 cars.

Q. Tell the jury whether or not you were there any part of that time to see how the work was done?

Defendant objects; overruled; defendant excepts.

A. Yes sir.

Q. Is this it, you were not there and do not know how these colored men were fixing the train 86 in track 11?

Defendant objects; overruled; defendant excepts.

A. Yes sir, I was around there I told you all the time.
Q. Is this not it, you do not know how they fixed the cars in 86?
A. Of course I know how they fixed them.
Q. Is this not it, you do not — how these cars were put in 86 and how the caboose was put there until after this man was killed, and you were off and not looking after your business?

Defendant objects; overruled; defendant excepts.

A. I was there, and could not possibly have been 75 yards from the caboose at any time.
Q. That the closest you ever got to it and the cars in 86?
A. No sir, I cut lots of them off and throwed the switch.
Q. What did you have to do with it and tell whether or not you knew about it and what you had to do with it, if you had anything do with it?
A. I had all to do about issuing the instructions.
205 Q. How many cars do you think you cut off and switched down there in track 11, making up 86?
A. I have no idea how many cars.
Q. How many do you think you had to do with, you were there, did you say you cut a number of them off and helped to switch a number of them and helped to throw the switch?
A. That is beyond my knowledge to answer that question; I do not know.
Q. Was it one or several?
A. It would be several.
Q. But you do tell the jury there was no car put in there except by your direction?
A. No sir, there was not.
Q. You knew they were being put in there?
A. Yes sir.
Q. Is this not it; when this train backed in No 10, you did not know what was going on and was not looking after your business?

Defendant objects; overruled; defendant excepts.

A. I certainly do know what was going on.
Q. You did not know that car was being put in No 10?
A. Certainly I did, or I am satisfied it would not have been put in there.
Q. Did you order it put in there?
A. I ordered them to go in Number 10 and bring out a cut of cars.
Q. Who did you tell that to?
A. To the colored brakemen.
206 Q. Who?
A. John Smith and George Tobias.
Q. Did you tell the engineer?
A. No sir.
Q. Did you tell the fireman?
A. No sir.
Q. Did you have to go to them and give them instructions? I mean tell them about the instructions?

Defendant objects; overruled; defendant excepts.

Q. I do not know particularly; I have explained fully before them what I was to do, and I have time and again, very seldom a day but what I let the engineer and colored brakemen see all my instructions.

Q. I am talking about the fireman?

A. I do not know whether I had or not.

Q. It was not the fireman's duty to make the car?

A. Not a bit in the world.

Q. All he had to do was to keep up steam and look for signals?

A. Yes sir.

Q. Did you know that this car was being put in 9 just before they went in No. 10?

A. Yes sir.

Q. Did you give instruction or direction to do that?

A. Yes sir.

Q. If I have understood you, so far as this yard crew was concerned you had full control?

A. Yes sir.

Q. You directed all of their movements and work?

A. Yes sir.

207 Q. What time of the night do you say this happened?

A. Somewhere about 10 o'clock.

Q. Dark or moon light night?

A. I do not know; the stars were shining; it was a fair night.

Q. Didn't it happen between 7 and 8 o'clock?

A. I do not know now; I can look at my reports and tell you.

Q. Is this not it, it happened between 7 and 8 o'clock that night.

A. I think I answered your question once; it was anyhow to my opinion he was killed about 10 o'clock.

Q. When did you get that opinion?

A. It jumped up in my mind a while ago.

Q. Were you not over in my office the other day, and didn't I ask you when it happened, and didn't you claim it happened at 1 o'clock?

Defendant objects; overruled; defendant excepts.

A. I do not know now what I told you.

Q. Didn't you say it happened at 1 o'clock and didn't you claim the moon was shining bright?

Defendant objects; overruled; defendant excepts.

A. I might have possibly told you that.

Q. And when you were telling me about this fellow going along here and you saw him asleep, and didn't you say the moon was shining?

Defendant objects; overruled; defendant excepts.

A. No sir, I did not; you asked me how I saw him asleep, and I told you the same as I started to,—that I shone my lantern up in his face and looked at him, and from all appearance he was asleep.

Q. Didn't you claim you were sitting by a post at the shop when the engine passed?

208 A. That was possible a minute before he was killed.

Q. Didn't you claim it was a nice moon light night?

A. I told you it was a star light night.

Q. Didn't you tell me in my office the moon was shining bright?

A. I possibly might have done that but I was not under oath.

Q. Why did you tell me it happened at 1 o'clock and a moon light night, and now you tell it happened at 10 o'clock and the moon was not shining?

Defendant objects; overruled; defendant excepts.

A. (No answer.)

Q. Is this not it, you and Wilson and these other fellows got together and agreed it was 10 o'clock and that the moon was not shining?

A. No sir.

Q. And since you told me that have you not consulted the almanac or calendar to find out whether or not the moon was shining?

A. No sir.

Q. Have you and Wilson and Smith talked over about what time that night it was when this happened since you talked to me in my office since you said it was 1 o'clock.

Defendant objects; overruled; defendant excepts.

A. No sir, no more than we just talked about the case.

Q. That is what I am asking you about; have you and them not agreed it was about 10 o'clock and there was no moon shining?

A. No sir, I hardly think so. I think I asked Mr. Wilson

209 the exact time and he told me; I had forgot, and he says, "somewhere about 10 o'clock"; and since then I have investigated some files and I am satisfied it was about that time.

Q. Back to the original proposition. This occurred between 7 and 8 o'clock?

A. I do not know.

Q. And you can not tell the jury can you?

A. I told you I thought it was near 10 o'clock.

Q. You got that idea from talking with Wilson since you have been summoned in this case?

A. No, sir, not in particular.

Q. Have you changed your statement since you made it to me claiming it was 1 o'clock in the morning?

Defendant objects; sustained.

Q. I believe you say when you saw Mr. Parker it was 20 minutes before he was killed when you say he was asleep?

A. Yes sir, about that or something to that effect.

Q. Did you see him firing his engine after that 15 or 20 minutes before he was hurt?

A. No sir, I do not think I paid any particular attention to it.

Q. Was he not firing his engine 15 or 20 minutes before he was hurt?

A. I could not tell you.
Q. I would like for you to show the jury how he was when you say you passed there and say he was asleep?
A. I could not tell you exactly how he was sitting; he was sitting astraddle the seat—that indicates the way he was leaning out—and asleep, leaning out like this and head this way (indicating.)
210 Q. How far did his hands stick out?
A. From his elbow.
Q. How long is it?
A. You can see.
Q. You say Mr. Parker's hands stuck out?
A. See, this is his arm. (indicating).
Q. We want to get it in the record, how far his hands were sticking out?
A. Anywhere from 18 to 15 inches; 18 inches.
Q. You say his head with his hands were stick*out* out?
A. Dropped over, limber neck; Chin on his breast.
Q. This way with his hands stick*out* out? (Indicating)?
A. Yes sir.
Q. I believe you woke him up?
A. I did.
Q. Did he straighten up?
A. Yes sir.
Q. And then about 20 minutes until he was killed?
A. Yes sir.
Q. You do not tell the jury he was asleep when these cars run together? Do you?
A. Certainly I could not tell you; but I will say this—if he was not asleep he was not attending to his business.
Q. Is that all you have to say in the way of a speech to this jury?

Defendant objects; sustained.

Q. Do you know what he was doing at the time he was killed?
A. No sir; he passed me about a minute possibly, long enough to back 100 or 200 feet, and was hanging out in the same position like he was.
Q. And he was also asleep in a minute before he was killed?
A. I do not know.
211 Q. He had his elbows sticking — 15 or 18 inches?

Defendant objects; overruled; defendant excepts.

A. Anywhere from 8 to 15 inches.
Q. Head down on his brea-t?
A. Yes sir.
Q. You saw him in that position?
A. Yes sir.
Q. Was the train moving then?
A. Very slow, yes sir.
Q. You would not wake him up that time?
A. No sir.

Q. You know then he was going into that caboose that you put down there?

A. I did not think he was going down that far.

Q. Don't you know he was not asleep?

A. I do not know.

Q. Don't you know it was a hot summer night and the engineer had his cab open?

A. That is perfectly al- right.

Q. Is it not a common thing for the engineer and fireman to rest *his* arms on the cab window and the cab open in the summer time like that?

Defendant objects; overruled; defendant excepts.

A. Yes sir.

Q. Now my question is,—you saw him about a minute before you say he was killed, and you knew then he was going down into 10?

A. Yes sir.

Q. You knew then that that caboose was setting in 11?

A. I knew the caboose was there but I hardly thought it was that close.

212 Q. You did not wake him up that time?

A. No sir, I was busily engaged at another thing.

Q. And that is the only reason?

A. I have two or three different reasons; I did not consider it my duty to follow him around and keep him awake.

Q. Do you tell the jury he was asleep than at the time you say you saw him a minute before he was killed?

Defendant objects; overruled; defendant excepts.

A. No sir, I can not tell you he was asleep but apparently he looked as though he was asleep.

Q. How far were you off when the train run into the caboose?

A. I guess a couple of hundred feet; not over a hundred.

Q. You were where you could look down the main track to that caboose?

A. Yes sir.

Q. Didn't you see that caboose there?

A. Yes, sir, I saw it and knew it was there.

Q. Didn't you see it was not in the clear?

A. No sir, I could not tell that.

Q. Is that the closest you had been to that caboose that night?

A. I had been to No. 10.

Q. How close is that?

A. I guess 50 or 80 feet.

Q. You are the man who threw No. 10 switch?

A. Yes sir.

Q. For this train to back in?

A. Yes sir.

Q. And you think that caboose was then to your left standing looking toward the depot?

A. No sir, the depot is this way.

213 Q. What do you mean by throwing and opening a switch?

A. That is to throw a rail over to turn the car in on a different track, go the way the switch was set.

Q. Was it not your duty to know whether or not that track was clear?

Defendant objects; overruled; defendant excepts.

A. Yes sir; but I was under the impression that it was clear, and in addition to that, one of the boys walked by.

Q. Was it not your duty before you opened that switch for this train to back in there, to know that that would clear the caboose?

Defendant objects; sustained; plaintiff excepts.

Q. Was that your duty to see that that track No. 10 was in the clear of this caboose, if it was why didn't you look to see whether or not it was in the clear?

Defendant objects; overruled; defendant excepts.

A. I did look.

Q. You could see the caboose there?

A. I could see the caboose there.

Q. Could you not tell it was not in the clear?

A. I could not tell from where I was.

Q. You could not tell?

A. No sir.

Q. Why didn't you go near enough to see before you opened the switch for this fireman and engine to go in there?

Defendant objects; overruled; defendant excepts.

214 A. Like I stated before, when the caboose was put down in there I was under the impression it cleared, and it did clear far enough to make the movement.

Q. When you were there you could not see from No. 10 switch whether or not it was clear, why didn't you go where you could see before you opened the switch?

A. I was under the impresion the car was in the clear, and if it did not clear I knew one of the brakemen would detect it.

Q. Where was the brakemen?

A. One was on the ground in front of the car, and the other was walking the last time I saw him on the other end of the track.

Q. The man who was going with the car he was in the car?

A. I hardly think so; might have been hanging on the car.

Q. If he was hanging on the car don't you know if he was hanging on the car and the car moving?

A. I do not know whether he was hanging on the side or end but my impression he was walking on the ground fixing to make a coupling.

Q. Coupling to what?

A. Cut the cars in 10.

Q. How far did you have to go in 10 before you got to these cars?

A. I do not know, 100 feet probably, maybe not so much.

Q. Is this not it,—that you were there that night in charge of the work, and was you not up there not attending to your business?

Defendant objects; overruled; defendant excepts.

A. No sir, I was attending to my business.

Q. Is it not because you did not look for that caboose and how it was put in there, and that that is what caused these cars to run together because you failed to look into it?

215 Defendant objects; overruled; defendant excepts.

A. The cars never run together.

Q. If you were there opening that switch and that brakeman motioned for him to come in there, was there anything for the engineer to do except take his train in there?

Defendant objects; overruled; defendant excepts.

A. No sir; that was his duty to go by signal.

Q. How much nearer was you to the caboose when you opened the switch than the engineer and fireman?

A. I might possibly been the length of the engine and that one car and maybe a little bit further; might say 150 or 200 feet.

Q. There was no car between you and the caboose where you were standing?

A. No sir.

Q. And no tender of the engine?

A. No sir.

Q. Is this not it;—it was so dark you could not see the caboose from where you opened the switch there?

A. Of course I could not see it like it was daylight, but I could detect the bulk of it.

Q. What is the ground covered with there, is it slack or black material?

A. Yes sir.

Q. Would the tracks on the ground in that dark material and being so far off as it was, could you when you were at No. 10 switch, tell how the tracks run with reference to the caboose?

A. No. sir.

216 Q. Now my question is, when you knew that, that you could not see whether or not it was in the clear, why didn't you go where you could see before you opened the switch for this man to back in?

Defendant objects; overruled; defendants excepts.

A. I told you I was under the impression the caboose was in the clear.

Q. If this car was 13908 M. C. that you say that was being put in local 89, and which might have gone to some other state, would Parker under his duties had anything to do with moving that car out of the state after it was put in train 89?

Defendant objects; overruled; defendant excepts.

A. No sir, I do not suppose he would.

Q. Why do you have other destinations of cars in your instructions and under 89?

A. That is merely a form that the company makes for the employes' convenience and wherever the destination of the cars is that goes to, you are supposed to put it in there.

Q. That was the destination of your car so far as your crew is concerned?

Defendant objects; sustained; plaintiff excepts.

Q. Did your crew have any duty or right to move that car on the 89 further than on the tracks in Middlesboro?

A. No sir, not unless we received instructions.

Q. When these persons were at No. 10, opening the switch, and motion for the train to come in, and the engine some 100 or so feet away, could the engineer or fireman do anything but consider lights?

A. I could not tell you about that.

Q. Did they go by anything except the lights, as lights made movements indicating the movements to do?

217 A. Certainly not; went by signals.

Q. If the man you had there give signals and signalled the engine to go into No. 10, was it his duty to do that under the movement?

A. Yes sir.

Q. Did the fireman have any right to object to him doing that?

Defendant objects; overruled; defendant excepts.

A. No sir.

Q. And you say occasionally there was signals given to the fireman and it was his duty to transmit them to the engineer?

A. Yes sir.

Redirect examination:

Q. I will ask you to tell the jury whether or not when you are down here on the lead track running toward 10 and 11 when moving directly toward the caboose, whether you could tell exactly where that caboose was setting, or any other person could?

A. No sir.

Q. Tell the jury whether or not when the box car and the engine and cab turned off on switch 10, passing directly by the rear end and the corner nearest to the moving cars, whether there was anything in the world to keep anybody, looking ahead, from seeing the caboose, or keep anybody from seeing that the box car was close to the cab?

A. Why no, if he had been looking ahead he could not help but see it.

Q. Tell the jury whether or not a box car and cab furnishes a guide by which you can tell practically the distance between the moving car and passenger station by the side of it?

218 Plaintiff objects; overruled; defendant excepts.

A. Yes sir.

Q. Then if Parker had been looking ahead the way his train was moving he could have seen that that caboose was close to the box car while passing it?

A. Yes sir.

Q. Was there anything to prevent him from seeing it?

A. Not anything that I know of.

Q. Attorney for plaintiff has asked you about your telling him as to whether or not it was a moon light night, tell the jury whether or not you told him anything like that?

A. I told him I thought possibly the moon was shining.

Q. Tell the jury whether or not you told him that you passed and told him he was asleep that you told that by mon light?

A. No sir.

Q. Do you know why he would tell the jury that?

Plaintiff objects; sustained; defendant excepts.

Q. In view of the fact he *was* asked you about the time of night, insinuating that you and the other employes of the defendant company have agreed upon the time, I will ask you if you made a report of the time that happened?

A. Yes sir.

Q. I will ask you to look at that record and tell the jury what that report says as to the time it occurred?

(Here witness looks at the purported report.)

A. I think this report says "10:10 P. M. June 30th."

Q. Tell the jury whether or not according to your recollection that is the correct hour?

A. Yes sir; that report is certainly correct.

219 Q. I will ask you to refer to the card about which you have been testifying, on which is given the destination of "M. C. #13908", which you say you were going to place into train 89, which was a train bound for points in Virginia and Tennessee, and have it made a part of your evidence, and mark it "W. R. T. No. 1."?

(At this point said card is introduced and made a part of this record, which is in words and figures as follows:)

"Form 70; revised April, 1902.

Louisville & Nashville Railroad Company.

"W. R. T. 6/30 1913.

Train No. Towns. Conductor.

Arrived at M.

Car No.	Initial.	Destination.	Route.	Contents.	Tonnage.
⅀) ⅀L(					
50319	LOU	4		EG	City Trk
14579	.....	5		Bx	" "
36907	B & A	89		"	" "
185767	Son	W2		Coal	" "
64816	Lou	4		EG	Mate Trk
Give	Furnace 2	.....	EBX	Cars	
Give	Tannery	1-36 ft	BOX	BGX	
13908	M. C.	89		MDS	10
1437	Lou	5		EB	10
8314	GSF	4		F	10
10039	St. L. sF;	City Trk		E. Furnace car	7
80848	Lou	W. 89		Coal	7
60988	"	Cent C & F Co		"	7
2477	CGW	4		Flat	3
14741	Lou	5		BX	3
48015	"	5		"	3
14828	"	5		"	3
91427	"	5		"	3
6483	"	5		"	3
9293	"	5		"	3
91768	"	5		"	3
108383	Ny C H	89		"	3
88693	Lou	89		"	3
2799	"	5		"	3
9377	"	5		"	3

220 Q. Tell the jury whether or not there were other cars which it was the duty of the yard crew to handle destined for train 89?

Plaintiff objects; overruled; Plaintiff excepts.

A. I see by this report there is a car or empty box car to train 89; and here is, on the same list I find two more empties to 89, and a car of coal to 89 to weigh off of No. 7; that is all the contents of which I have.

Q. If I understand you at the time you were moving into track 10 you had an empty box car attached to your engine merely because it was in your line of employment?

A. Yes sir.

Q. And you sometimes during the next morning placed that empty box car at some industrial track in Middlesboro?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir.

Q. If I understand you there were more cars between "M. C.

#13908, and they were probably dead cars; that is to say—cars for which you had no destination, just standing in the yard?

A. Yes sir.

Q. And I believe you say, of course, it was necessary to hook to them and first move them before you could reach or get car M. C. #13908" for train 89?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir.

221 Q. These cars were merely standing on the track between your engine and M. C. #13908" if I understand you?

A. Yes sir.

Q. Tell the jury whether or not the persons who controlled the engine and equipments that moved train 89 from Middlesboro to points in Virginia and Tennessee had anything at all to do with making up the train and taking this car from the siding and placing it into that train, or whether that was the duty of the yard crew of which Parker was a member?

Plaintiff objects; overruled; plaintiff excepts.

A. It was the duty of the yard crew to make up that train.

Q. The crew in charge of train 89 after that train had been made up simply picked up the train and moved it out after it was made up by your yard crew?

A. Yes sir.

Recross-examination:

Q. Was this not the way that was worked up there,—that you yard crew only made up trains when they had time?

A. Well, we generally always had time.

Q. But that was not your regular work and you only made up trains when you had extra time?

Defendant objects; overruled; defendant excepts.

A. It was always customary to do my yard work, and with the extra time I had to go to Mingo Hollow; We always done the yard work first.

222 Q. These three empty cars you spoke about you were going to put them in 89?

A. I do not know whether I had these already made or whether I was going to put them in there afterwards.

Q. You do not know whether Parker handled any of them?

A. No sir.

Q. This other car you spoke about going in 89, you do not know whether or not Parker handled it?

A. No sir.

Q. This car that you put in 9 and when that was attached to the engine and just before you went into 10, and also the one you had attached to your engine when you went into 10, where did you get them?

A. I expect those were 87 cars I was putting in the proper place with them, possibly this car come out of 87 train or this car was going in 9 to be switched or weighed.

Q. So you brought this car that you taken in 10 from track 7?

A. No sir, I do not know what track; No. I think we relieved 87 with anything on No. 1.

Q. You brought it from No. 1 track?

A. Somewhere there.

Q. How far had you brought the car from No. 1 to No. 10?

A. It is the length of that yard; I do not know; the car was moved between 600 and 800 yards on the Furnace yards.

Q. If Parker had anything to do with these three empties and loaded car you have been asked about, he would not have had anything to do with taking them into another state?

Defendant objects; overruled; defendant excepts.

223 A. No sir, only got them on 89.

Q. That would have been the destination so far as your crew is concerned?

A. Yes sir.

Q. He would have been still in Middlesboro in this state?

A. Yes sir.

S. H. ADAMS, being duly sworn as a witness for the defendant, testified as follows:

Direct examination:

Q. Where do you live?

A. Knoxville, Tennessee.

Q. In what business are you engaged?

A. Louisville & Nashville Railroad Company.

Q. What kind of work?

A. Bill Clerk.

Q. Where?

A. From the office, Knoxville.

Q. In what business were you engaged in June and July, 1913.

A. Making local way-bills for merchandise cars.

Q. I will ask you to state whether or not you made up the way-billing or had the merchandise placed in car "M. C. # 13908" sometime in June, 1913?

A. I did.

Q. I show you two way-bills and ask you to examine them and tell the jury whether or not you or who made these way-bills and where they were made?

(Here witness is handed the two purported way-bills, which he examines.)

A. I made them.

(Here follows way-bills, marked page 224.)

a

LOUISVILLE & NASHVILLE R. R. CO.

Local Freight Way-bill Knox

TRANSFERRED TO { Initial ____ Initial ____

BINDING MARGIN (NOT) TO BE WRITTEN IN.

SHIPPER. Connecting Line Reference, Original Car and Way-bill Reference and Point of Shipment				MARKS	CONSIGNEE
WAY-BILL REFERENCE.					
CARRIER	DATE	NUMBER	FROM		
	8	6	Walls		Geo. C
					(845)

a

FORM 684 OLD FORM 113 Revised June, 1909.

VILLE R. R. CO. Line Initial ____ Road Initial N & C Car No. 13908 Marked Capacity ____ W. B. No. B1897

Bill Knox J. { Station No. 277 / Block No. 7 } To Big Stone Gap Date 6/28 1913

ED TO { Initial ____ No. ____ At ____ 191 / Initial ____ No. ____ At ____ 191 } 8 9 Harris 7/1

WEIGHED AT (1) { Gross ____ / Tare 3 / Net ____ }

MARKS	CONSIGNEE AND DESTINATION	ARTICLES	WEIGHT Separate	WEIGHT Aggregate	Rate	Freight	Charges	Prepaid	TO BE COLLECTED
Ils	Geo. Parrott								
		1½ Brl Cider		290	31	90			
	(845)	1 Bx Hmare		5	67	03		(93)	93

BINDING MARGIN—NOT TO BE WRITTEN IN.

LOUISVILLE & NASHVILLE R. R. CO.

FORM 6[illegible] OLD FORM 112[illegible]—Revised June, 1909.

Line Initial _____ Road Initial M C Car No. 13908 Marked Capacity _____ W. B. No. B1898

Local Freight Way-bill _____ Station No. C 275 Block No. 7 To Appalachia Date 6/28 1913

TRANSFERRED TO Initial _____ No. _____ At _____ 191_
Initial _____ No. _____ At _____ 191_

WEIGHED AT Va Gross _____ Tare 5 Net _____

SHIPPER. Connecting Line Reference, Original Car and Way-bill Reference and Point of Shipment — WAY-BILL REFERENCE. CARRIER	DATE	NUMBER	FROM	MARKS	CONSIGNEE AND DESTINATION	ARTICLES	WEIGHT Separate	WEIGHT Aggregate	Rate	Freight	Charges	Prepaid	TO BE COLLECTED
L & N C					D. J. Maggard Stonega, Va. 36 7/2	8 Bars Iron OK		400	31	1 24	✓		1 24
C M McClung					Appalachia	H. Iron							

INTER-LINE WAY-BILL. C

FORM 6804. Revised June, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

WAY-BILL MADE BY _____ (Initials of Issuing Carrier) DATE _____ SERIES AND NO. _____

FROM _____ Station _____ State _____ To _____ Station _____ State _____ CAR Initials _____ Number _____

Route to Destination of Way-Bill. Show each Junction and Carrier in Route Order. } VIA

Weighed at	Gross	Tare	Allowance	Net	Length of Car	Marked Capacity of Car Lbs.	Stenciled Weight of Car Lbs.	Weight of Car and Contents Tons.	Weigh Car at

Instructions Regarding Icing, Non-Icing, Ventilation, Etc.

Stop this Car at _____ For _____

Transferred at _____ Station _____ To _____ Car _____

Full Name of Shipper, Point of Shipment, Original Car, Connecting Carrier, and Previous Way-Bill Reference	Consignee, Destination, Marks and Routing Beyond Destination of Way-Bill	Number of Packages, Articles, and Classification Conditions	WEIGHT	*Rate and Tariff No.	FREIGHT L. & N. Arbitrary	FREIGHT Joint	FREIGHT Connecting Line Arbitrary	ADVANCES IN DETAIL	TOTAL PREPAID
	Appa. Va 4 (738)	Bu. 11 pes corrip ck		45	6 49				4 19
Int Har Co	P L Jett 1	Stoner 1 Hd							
	Meadota, Va. 1	frames & Wheels							
		11 Tongue							
		1 cutt Bar							
	No 9 7/2	1 Bx Parts							
		1 Seat & Spring ck'd	840		18 44			1 53	1 95
("Ex. "S. N. C." No II.)									
			12 85					3 25	3 28

For Additional Charges see _____ Way-Bill No. _____ Date _____ 191__ For _____ $ _____

*Rates and one-half inches on the left margin of tissues for binding.
Rates named and a shipment is to be routed as routed the subdivisions must be shown in the rate column in route order, noting
Each Rate named and a shipment is to be routed as routed the subdivisions must be shown in the rate column in route order, noting
Each Rate named and a shipment is to be routed as routed the subdivisions must be shown in the rate column in route order, noting
this way-bill affecting other carriers, Routing, Car Numbers, etc.—and all gatelines as to Shortage, Damage, etc., must show station at
dated and signed by the authorized party making same. Notations must not be written or stamped in the Revenue columns.

225 Q. When?
A. On the night of June 27th.
Q. Where?
A. In the freight offices, Knoxville.
Q. Knoxville, Tennessee.
A. Yes sir.
Q. I will ask you to read these Way-bills to the jury, and make them as part of your evidence, and mark them "Ex. S. H. A."?

Plaintiff objects; overruled; plaintiff excepts.

(Here said way-bills were read to the jury, which are as these copied inserted herewith,) and attached hereto.

226 Q. I believe you say you made these way-bills?
A. Yes sir.
Q. And into what car were the articles named on these bills placed at Knoxville, Tennessee?
A. Into car M. C. 13908.
Q. Do you know of your own personal knowledge in what direction a car loaded at Knoxville, destined for points shown on this Bill will travel?
A. They go from Knoxville to Corbin and from Corbin to Middlesboro.
Q. And then from Middlesboro?
A. To stations beyond Middlesboro.
Q. What line of railroad does shipments in this territory move on, between these points?
A. L. & N.
Q. Give us the date of that again?
A. 6/28/1913.
Q. What do you mean?
A. June 28th, 1913.
Q. I believe you say these are the originals which you yourself made?
A. Yes sir.
Q. Were there other articles placed in that car at Knoxville Tennessee besides those shown on these two Bills?
A. Yes sir.
Q. Have you way-bills for any other articles than these?
A. The original?
Q. Yes?
A. No sir.
Q. Have you records or copied of the original, which you made of the other articles contained in that car?
227 A. I have.
Q. To what points were the other articles therein contained destined?

Plaintiff objects; overruled; plaintiff excepts.

A. To points beyond Middlesboro,—Shawnee, Tennessee.
Q. That point in Tennessee can be reached only by a train moving from Knoxville, Tennessee to Corbin, Kentucky, and from Cor-

bin, Kentucky, through Middlesboro, through Big Stone Gap, Virginia?

A. Yes sir.

Q. And there were some other articles other than those which you have mentioned?

A. Yes sir.

Q. And all destined beyond Cumberland Gap into Tennessee and Virginia?

Plaintiff objects; sustained; defendant excepts.

Q. To what points were the- destined?

A. To points beyond Middlesboro; Shawnee, Tennessee was the first point; next Wheeler, Virginia; next Rose Hill, Virginia, and then points between there and Dorchester Junction, Virginia.

Cross-examination:

Q. What was going to Rose Hill?

A. I do not remember.

Q. What was going to points between Rose Hill and Dorchester Junction?

A. Merchandise.

Q. What was it?

A. Composed of various articles.

Q. What were they?

A. Hardware and groceries.

Q. You help to load this stuff into the car?

A. No sir.

228 Q. Did you see it loaded?

A. No sir, I did not see it loaded into the cars.

Q. So far as you know, you do not know that any of it was put in the car, so far as you know personally?

A. I saw the car with it and I knew a car of merchandise was in it.

Q. You saw what?

A. Car of merchandise.

Q. How far was the place from where you made out these bills to where the car is supposed to be loaded?

A. 100 feet.

Q. You did not see it loaded did you?

A. I do not know of any particular piece; I saw the merchandise.

Q. Was any of that merchandise for Corbin?

A. No sir.

Q. Was any of that merchandise for Barbourville?

A. No sir.

Q. Was any of that merchandise for Middlesboro?

A. No sir.

Q. None at all?

A. No sir.

Q. Do you know where that car was on the 30th of June?

A. No sir.

Q. Do you know where it was on the 29th of June?

A. No sir.

Q. Do you know where it was on the 28th of June?

Defendant objects; overruled; defendant excepts.

A. No sir.
Q. Do you know where it was on the 1st of July?
A. No sir.
Q. Do you know where it was on the 2nd of July?
A. No, sir.

229 Redirect examination:

Q. If I understand you do not know where it was on the 28th of June?
A. On the night of the 27th I knew where it was; these way-bills are dated a day ahead, that is afternoon work.
Q. That is work that is done in the afternoon had gone, moved out?
A. Had gone, moved out before the way-bills are dated.
Q. They are dated the day before?
A. Yes sir.
Q. Tell the jury whether or not merchandise loaded at Knoxville, that is destined to points beyond Cumberland Gap are placed on the same car with merchandise that is destined to Middlesboro, Corbin, Barbourville, or whether in separate cars?
A. They are loaded into separate cars.

T. B. COLSON, being duly sworn as a witness for the defendant, testified as follows:

Direct examination:

Q. Where do you live?
A. Middlesboro.
Q. In what business are you engaged.
A. Conductor.
Q. In what business were you engaged June and July, 1913?
A. I was working for the L. & N. conductor.
230 Q. Between what points?
A. Between Middlesboro and Corbin.
Q. And tell the jury whether or not you at any time were conductor of freight train running from Middlesboro to Norton, Virginia.
A. Yes sir. I was on the road through from Corbin to Norton.
Q. What was the number of your train running out of Middlesboro for Norton, Virginia, July 1st, 1913?
A. The best I remember I was on the north end.
Q. What was the number of your train?
A. Running from Middlesboro to Norton?
Q. Yes sir?
A. I do not remember if I was on the south end from Middlesboro to Norton, I was from Corbin to Middlesboro.
Q. Oh what was the number of the train running out of Corbin for Middlesboro on June 29th?

A. 85.
Q. No. 85?
A. Yes sir.
Q. Can you tell the jury what cars you carried on that train from Corbin to Middlesboro?
A. Yes sir.
Q. I will ask you to tell the jury from your records or memory whether you carried car M. C. #13908?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir.
Q. Have you any record of that with you?
A. Yes sir.
Q. Please refer to that record and say to the jury what it shows with reference to that car?

(Here witness refers to a record in his possession.)

231 A. I handled M. C. 13908 from Corbin to Middlesboro.
Q. When did you make that record?
A. I made it June 29th, 1913.
Q. When did that car move from Corbin to Middlesboro?
A. I left Corbin at 12:40 A. M. arrived in Middlesboro 4:40.
Q. With what car?
A. Yes sir, with that car.
Q. Tell the jury if you know where that car came from to Corbin?
A. It was billed from Knoxville.
Q. Do you have the way-bill by which you carried it?
A. Yes sir.
Q. To what points was it destined?
A. I could not say; I did not look through the waybills; it was at Middlesboro; I did not fool with that further.
Q. You did not *brake* it open?
A. No sir.
Q. Your bill showed it came from Knoxville and destined on your train to Middlesboro?
A. Yes sir.
Q. Tell the jury whether or not if you know personally whether the car came to you sealed?
A. Yes sir, when I taken it at Corbin it was sealed.
Q. Tell the jury whether or not you or any of your crew broke the seal or took any goods out between Corbin and Middlesboro?
A. No sir.
232 Q. Tell the jury whether or not you had any goods contained in that bill destined *in* any points in Kentucky?
A. Nothing in it between Corbin and Middlesboro that I know of.
Q. Tell the jury into what states, if you know, the L. & N. Railroad runs, has line of road?
A. Into several; I do not know; Kentucky and Tennessee and several more I guess, I do not remember.
Q. Virginia?
A. Yes sir.

Q. Tell the jury if you know whether the defendant company has a line of road running through Knoxville, Tennessee, through Corbin, Kentucky, and from Corbin, Kentucky, on to Norton, Virginia, through Middlesboro?

A. Yes, sir, the L. & N. runs from Knoxville to Corbin and from Corbin to Norton, Virginia.

Q. Tell the jury whether or not it hauled freight and passengers to and from Knoxville, Tennessee to Corbin, Kentucky and Norton, Virginia?

A. Yes sir.

Q. Tell the jury whether or not it did that through the months of June, July, 1913?

A. That is where I was working for the L. & N. at that time on the north end.

Q. Tell the jury whether or not prior to that time and every since that time it has been taking freight and passengers between these points?

A. Yes sir.

Cross-examination:

Q. You say you were running between Corbin, Kentucky and Middlesboro, Kentucky?

233 A. Yes sir, now.

Q. Why did you stop at Middlesboro?

A. Because that is my terminal; that is as far as I go.

Q. The through line on which you were running was between Corbin and Middlesboro?

A. Yes sir.

Q. Both of them in this state?

A. Yes sir.

Q. I believe you say you took this car to Middlesboro, the car you are speaking of on the 29th of June?

A. Yes sir.

Q. And delivered it to Middlesboro about 4 o'clock on the evening of June 29th?

A. 4 o'clock in the morning.

Q. You do not know where that car that you are talking about was on the night of June 30th?

A. I do not know anything about that where it was the 30th.

Q. Anyhow you delivered it to the terminal on the through division?

A. Yes, there in the yards on the morning of the 29th; M. C. #13908 on the morning of the 29th at 4:40 I believe.

Q. When you deliver a train at Middlesboro that train is broken up?

A. I leave it there and they have the yard crew that switch it.

Q. That train is broken up after you deliver it?

A. Yes sir.

Q. And those cars that you deliver there and which your train brought up, they were delivered to the industrial concerns, at Middlesboro, Kentucky?

A. Yes, sir, some of them.
234 Q. What was the number of your train?
A. 85.
Q. If any of these cars were taken to another state, it was after they are put into another train, different number?
A. Yes sir.
Q. A train of a different crew and different number?
A. Yes sir.

H. E. HARRIS, being duly sworn as a witness for the defendant, testified as follows:

Direct examination:

Q. Where do you live?
A. Norton.
Q. In what business are you engaged?
A. Conductor.
Q. What company?
A. L. & N. Railroad company.
Q. Tell the jury in what business you were engaged June and July, 1913?
A. Conductor on a local on the south end out of Middlesboro to Norton.
235 Q. From what point to what point did you run?
A. From Norton to Middlesboro, and Middlesboro to Norton.
Q. Where is Norton?
A. In Virginia.
Q. Through what states did you pass in running from Middlesboro Kentucky to Norton, Virginia?
A. Tennessee and Virginia and Kentucky.
Q. Through a part of Kentucky?
A. Yes sir.
Q. On what line of road did you run between these points then?
A. Over C. V. Division.
Q. Of what railroad?
A. Louisville & Nashville Railroad Company.
Q. State whether or not you handled a train out of Middlesboro about July 1st, 1913, for Norton, Virginia?
A. Yes sir.
Q. Of what was that train composed, whether it was a through local train between points in Virginia?
A. Local train.
Q. Tell the jury whether or not, without asking you as to other cars, you carried in that train a car M. C. #13908", from Middlesboro to any point?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir, I handled it from Middlesboro to Appalachia on July 1st, train 89.
Q. From Middlesboro to Appalachia?

A. Appalachia, 10 miles this side of Norton.

236 Q. In what State?

A. Virginia.

Q. Through what states or parts of state- did you run in handling that car from Middlesboro to Appalachia on July 1st, 1913?

A. Out of Kentucky into Tennessee and Virginia.

Q. I will ask you whether or not you have any record, which you made with reference to the handling of that car?

A. Yes sir.

Q. Referring to that please, read to the jury what record you made of it?

Plaintiff objects; overruled; plaintiff excepts.

A. Here is the record of it on the train book, but I also have a check sheet, a record.

Q. Read to the jury what record you have on your train book with reference to the handling of this train?

A. My train book here, I picked up a car at Middlesboro and broke the lock at Shawnee, Tennessee.

Q. Broke the seal at Shawnee?

A. Yes sir.

Q. Read what record you have on your train book?

A. I have the record opened up at Shawnee, run out at Appalachia; and here is my seal record,—M. C. 13908 taken from Middlesboro and left at Appalachia, Virginia.

Q. Do you know what that car had in it?

A. Merchandise for points beyond—from Middlesboro to Appalachia.

Q. Tell the jury who had the way-bills for the merchandise contained in that car from Middlesboro to Appalachia?

237 A. I did myself.

Q. You as conductor?

A. Yes sir.

Q. I show you some way-bills, and ask you to examine them and tell the jury whether or not you ever handle these way-bills or the goods referred to thereon?

Plaintiff objects; overruled; plaintiff excepts.

(Here witness is handed way-bills.)

A. I have no record of these billings more than this is an individual bill is all I can say.

Q. Tell the jury whether or not you handled and unloaded the goods that were in M. C. 13908 on July 1st, 1913?

Plaintiff objects; overruled; plaintiff excepts.

A. Yes sir.

Q. Have you records showing the goods which you unloaded from that, or the points at which you unloaded goods from that car?

A. I have a record of the points but do not have any record of the goods.

Q. You do not have a record of the items but the points?

A. Yes sir.

Q. Read that to the jury.

Plaintiff objects; overruled; plaintiff excepts.

A. My first record opens up by unloading, freight at Shawnee, Tennessee, out of 13908; and also unloaded freight over at Wheeler, Virginia; also unloaded freight at Emory, Virginia; at Hagan, Virginia; also unloaded freight out of it at Benhur, Virginia; also at Pennington, Virginia; also unloaded it at Big Stone Gap, Virginia; and that is the last.

238 Q. When did you do that?

A. July 1st, 1913.

Q. I will ask you to have this report made a part of your evidence and mark it "H. E. H. Nos. 1 and 2."

(Said reports are filed and made part of this evidence, and are in words and figures as follows.)

(See next page.)

(Here follow conductor's freight checks, marked pages 239 and 240.)

("H. E. H. #1.)

Louisville & Nashville Railroad Company.

Form 288.

Freight Checks.

Received of H. E. Harris, conductor of train 89, station No. —, —— —, 1913, all the freight as entered on way-bills (Nos. specified below).

Exceptions noted:

No. of way bill O	No. of car.	From station No.	Freight short.			
			Articles.	Marks.	Consignee.	Agt. signature.
M 1593	536565	T110	1 Bx short	CV248	A. E. Noe	M. McDonald
M 1592	"	"	1 Bx short	"	W. M. Noe	
A 1020	86639	KC110		CV256		
B 1986	13908	C277		"		
H 4583	2823	0		"		
KD 1158	536564	T110		"		
A 1026	86639	KC110		CV260		Wilson.
A 1021	"	"		"		
1247	"	CJ202		"		
A 1493	13908	809		"		
B 1903	"	6277		"		
B 1904	"	6277		"		
K 61203	33332	T110		"		
H 4584	2823	0		"		
KD 1156	536564	T110		"		
KD 1157	"	"		"		
KD 1158	"	"		"		
1367	"	216	1 mantel glass broken	"	Geo. Pennington	
H 4585	2823	0		CV271		Bailey
B 1897	13908	C277		CV276		
KD 1200	33332	T110		"		
H 458	2823	0		"		
KD11625	36564	T110		"	Lile	
" 1161	"	"		"		

On the back is the *follows:*

Conductor's Freight Check.

C. V. Division.

Train No. 89—Section No. —.

From Middlesboro, Ky. to Norton, Va.

7/1/1913.

H. E. Harris, Conductor."

"Ex. H. E. H. #2."

Louisville & Nashville Railroad Company.

Form 288.

Freight Check.

Received of H. E. Harris, conductor of train No. 89, station No. —, 7/1/1913, all the freight as entered *as* way-bills. Nos. specified below.
(Exceptions noted.)

No. of way-bill	No. of car.	From station No.	Freight short.			
			Articles.	Marks.	Consignee	Agent's signature.
PH 871	10508	H485		CV220		Slemp
KD 1197	33332	T110		"		
H 4580	2823	0		"		
1362	23715	CV216		CV220		H. E. Harris
B 1892	13908	C277		CV222		Hugh J. Harder
B 1893	13908	C277		CV277		G. W. Arnold
H 4581	2823	0	1 bx brushes short	"	Roscoe Bryant	
1363	23715			"		
Co 268	"	"		"		
B 1894	13908	C277	1 glass broken	CV235	M. E. Dean	
KD 1196	33332	T110		"		
1364	23715	CV216		"		Hamper
H 4582	2823	0		CV239		Salyor
1365	23715	CV216		"		
B 1814	86634	CV277		CV241		H. E. Harris
B 1895	13908	C277		CV244		McDonald
1366	23715	CV216		"		
KD 1163	536564	T110		"		

On the back is the following:

"Conductor's Freight Check."

C. V. Division.

Train No. 89—Section No. —.

From MBoro. Ky.

To Norton, Va.

7-1-1913.

H. E. Harris, Conductor.

241 Q. Into what states does the L. & N. Railroad campany carry freight and passengers to your knowledge and did it on and prior to July 1st, 1913?

A. They carried freight into Virginia and Tennessee.

Q. Tell all you know about that yourself personally?

Plaintiff objects; overruled; plaintiff excepts.

A. They handled freight every day in all that time and all along through Virginia, Tennessee and out of Kentucky, daily.

Q. Tell the jury whether or not the car about which you have testified was made up and placed in train No. 89, at Middlesboro, prior to the time you took charge of the train, or whether you or your crew placed it in that train?

A. It was in the train; I know it was that morning.

Q. And you and persons with you took up that car together with others at Middlesboro and hauled it through Cumberland Gap, Tennessee?

A. Yes sir.

Q. Into Virginia?

A. Yes sir.

Cross-examination.

J. M. Robsion:

Q. From Middlesboro to Norton, Virginia is another freight Division of the L. & N. Railroad Company?

A. Its Division for local.

Q. Division for local freight?

A. Yes sir.

242 Q. Such as you have in this car?

A. Yes sir.

Q. You do not know what had been done with the car in Middlesboro where it had been while it was there?

A. No sir.

Q. Don't know it has any connection with the killing of Ed Parker?

A. No sir.

Q. You know nothing about that?

A. No sir.

At this point, the defendant closed its case in chief, and the plaintiff offered the following in rebuttal:

E. L. Wilson, called in rebuttal.

Direct examination.

By J. M. Robsion:

Q. Do you know where that restaurant is there near the railroad yards where the railroad men eat at Middlesboro?

A. Yes sir.

Q. How close is that to the crossing there?

A. Something like 200 feet.

Q. Tell the jury whether or not 10 or 15 minutes before Mr. Parker was killed, that your engine was there at the crossing and Mr. Parker went over to the restaurant and got him a lunch?

243 Defendant objects; overruled; defendant excepts.

A. I have no remembrance of it.

Q. Tell the jury whether or not that happened?

Defendant objects; overruled; defendant excepts.

A. I do not know whether it happened or not; if he got off and went it was without my knowledge.

Q. Tell the jury whether or not your engine stood over there on the crossing, near that restaurant, some 10 or 15 minutes before he was killed?

A. No sir, it did not.

Q. You spoke about a fellow by the name of John Smith. Do you know where he is?

A. He is in the room.

Q. That a colored man?

A. Yes sir.

Q. Tell the jury whether or not you blowed or whistled there when the accident occurred?

Defendant objects; overruled; defendant excepts.

A. Yes sir, just immediately after it occurred I blew the distress signal.

Q. Tell the jury whether or not within 10 or 15 minutes before you blew that distress signal that your engine was off over on the crossing and Mr. Parker got off the engine and went to the restaurant and got him a lunch and came back and got on thee train?

Defendant objects; overruled; defendant excepts.

A. I have no remembrance of him getting off the engine at all that night.

244 W. R. TOWN, called in rebuttal.

Direct examination:

Q. Mr. Town, do you know where is located the restaurant in Middlesboro, near the railroad yards where the railroad men eat there?

A. Yes sir.

Q. And was there such a restaurant there at the time Mr. Parker was killed?

A. Yes sir, I think so.

Q. Now, tell the jury whether or not the engine of this switch crew on the night that Parker was killed and immediately after he was killed ever blew or sounded the distress signal?

A. Yes sir, blew the distress signal.

Q. Tell the jury whether or not this engine was stationed on the

crossing, near the restaurant, in 10 or 15 minutes before Parker was killed, and Parker went to that restaurant and got him a lunch?

Defendant objects; overruled; defendant excepts.

A. I am unable to answer that question; I do not know.

Q. State whether or not the engine was there at the crossing and it stood there and Parker went to this restaurant and got him a lunch, and he was killed within 10 or 15 minutes after that time?

A. That is bound to be a mistake, because we had been switched and left there 30 minutes.

Q. I am not asking you to make a speech; just answer my question.

245 G. M. WELLS, being duly sworn as a witness for the defendant, testified as follows:

Direct examination:

Q. Where do you live?
A. Corbin, Kentucky.
Q. How old are you?
A. Twenty-six years old.
Q. In what business are you engaged?
A. Employed with the L. & N. Railroad Company as Brakeman.
Q. And on what division of the L. & N. Railroad did you work?
A. C. V.
Q. What is called the Cumberland Valley Division?
A. Yes sir.
Q. Between what two points?
A. Between Corbin and Norton.
Q. What is the name of the train that you work on?
A. I am on through freight service now.
Q. Did you know Ed Parker?
A. Yes sir.
Q. Where were you on the night he was killed?
A. Middlesboro.
Q. And where had you been that day?
A. I had worked on local from Corbin to Middlesboro.
Q. Did you see the caboose where he was said to have been killed?

Defendant objects; overruled; defendant execepts.

A. Yes sir.
Q. Had you been on that caboose?

Defendant objects; overruled; defendant excepts.

A. I had.

246 Q. Where had it been taken from to where?

Defendant objects; overruled; defendant excepts.

A. Corbin to Middlesboro.
Q. Did you see Mr. Parker that night before he was killed?

Defendant objects; overruled; defendant excepts.

A. Yes sir.
Q. Where was he?
A. He was in a restaurant at Middlesboro.
Q. What restaurant?

Defendant objects; overruled; defendant excepts.

A. Known as the Railroad restaurant.
Q. And where was it located with reference to the yards there?

Defendant objects; overruled; defendant excepts.

A. It is to the south end of the yard, 40 yards I guess from the south end.
Q. Do you know where there is a crossing to the yards and near that restaurant?
A. Yes sir.
Q. How close is the restaurant to the crossing?
A. 45 or 40 yards.
Q. How far is it from the restaurant to where this caboose was where Parker was killed?
A. I judge it 100 yards.
Q. Where did Mr. Parker go to after he left the restaurant?

Defendant objects; overruled; defendant excepts.

A. I presume he went to his engine.
Q. Tell the jury whether or not you heard any alarm, whistle or distress whistle blow before you had information that Parker was killed?

247 Defendant objects; overruled; defendant excepts.

A. I heard the whistle. It was a little unusual; it was not a distress signal; it was not commonly used; it seemed to me it would call the attention of someone.
Q. Tell the jury whether or not Parker's engine was upon the crossing about 40 yards from that restaurant, and Mr. Parker came over to the restaurant and got him a lunch 10 or 15 minutes before you heard that distress signal?

Defendant objects; overruled; defendant excepts.

A. The engine when I came out of the restaurant was near that crossing, and whether he was on it then or not I could not say.
Q. Tell the jury whether or not Parker came in there and in the restaurant and got a lunch?
A. He did.
Q. Tell all about it that you know.

Defendant objects.

"By the Court": Tell how long it was from the time you heard the distress signal?

A. Something like 15 minutes I judge; I do not think it was over that.

Q. Where did Parker go after he got his lunch? Did he go out of the restaurant?

Defendant objects; overruled; defendant excepts.

A. Yes sir, he went out of the restaurant toward where his engine was when I came out, went in that direction.

Q. After you came out how far had you gone or walked until you heard this distress whistle? This whistle blowing?

Defendant objects; overruled; defendant excepts.

A. 250 or 300 yards.

Q. Where were you going at the time you heard the whistle?

A. I had started to the saloon.

Q. For what purpose?

248 Defendant objects; sustained; plaintiff excepts.

Q. Tell the jury whether or not that was your place to sleep?

Defendant objects; sustained; plaintiff excepts, and avows that if the witness were permitted to answer he would answer in the affirmative.

Q. What lunch did Parker get there at the restaurant?

Defendant objects; overruled; defendant excepts.

A. All I saw him get, as well as I remember it was an egg sandwich and a bottle of coca cola; it was a sandwich of some kind, and I believe it was an egg sandwich.

Cross-examination.

H. H. Owens:

Q. Do you know what a distress signal is?

A. I ought to.

Q. You do not?

A. Yes sir.

Q. You did at that time, didn't you?

A. Yes sir.

Q. What you tell the jury you heard was not a distress signal.

A. It was not a proper distress signal.

Q. What is a distress signal of an engine whistle?

A. A succession of short whistles followed by a long whistle or blow.

Q. This was not that kind was it?

A. No sir.

249 At this point, the defendant moved the court to exclude the evidence of this witness from the jury; overruled; defendant excepts.

Redirect examination:

Q. Where was this whistling with reference to the caboose down there?

Defendant objects; overruled; defendant excepts.

A. It was right near the caboose.
Q. Now, was there any other engine around there: Any other whistling at the time Parker was killed?

Defendant objects; overruled; defendant excepts.

A. I did not hear any.
Q. Are you related to Parker in any way?
A. No sir.
Q. Have you any interest in this case?
A. No sir.

Recross-examination:

Q. The whistling you heard might have been calling Parker?
A. I do not know who it was calling.
Q. It was not somebody?
A. I taken it for granted it was calling some one's attention to someone.
Q. Parker was away from his engine?
A. He was when I saw him.

Redirect examination:

Q. Parker had been gone from you 10 or 15 minutes at the time of the whistle blowing?

Defendant objects; sustained; plaintiff excepts.

250 NATHAN PARKER, called in rebuttal.

Direct examination:

Q. Tell the jury whether or not one of your son's hands were scratched in any way or bruised?

Defendant objects overruled; defendant excepts.

—. If so, I never saw no scratch on them.

At this point, the plaintiff closed its case in rebuttal.

By the COURT:

"GENTLEMEN OF THE JURY: Some witness introduced upon this trial, or perhaps more than one, spoke in his evidence *or* certain repairs made to the car which was being moved or to the caboose, which is mentioned in the evidence. I disremember whether there was an objection at the time to the evidence or not, but if there was it should have been sustained. I want to admonish you not to consider any evidence given by any witness in reference to any repair made upon the car or caboose, mentioned in the evidence, and that is now withdrawn from your consideration."

At the conclusion of all the evidence introduced on the trial of this case, came the defendant and moved the court upon the state of the pleadings and the evidence introduced in the trial of this case, to instruct the jury to find a verdict for the defendant; and because the case pleaded by plaintiff has failed of proof, and because under the pleadings and evidence there is no evidence authorizing the right of the plaintiff to recover a verdict in this case; which motion the court overruled; and the defendant, Louisville & Nashville
251 Railroad Company excepts, to all of which the defendant, Louisville & Nashville Railroad Company excepts.

Comes the plaintiff and moves the court to exclude from the consideration of the jury all the evidence offered by the defendant by its witnesses, Town, Wilson, Harris, and Adams, in reference to car No. 13908, M. C., and which was alleged to have been on track No. 10 the night Parker was killed and removed and placed in train No. 89 after Parker was killed. The court having considered said motion, overruled same to which ruling of the court the plaintiff excepts.

The court gave to the jury instructions Nos. I, II, III, IV, V and VI, to all of which instructions the defendant at the time objected and excepted, except to instruction No. VI, but its objection was overruled, and to that ruling of the court the defendant at the time excepted and yet excepts.

Before the court gave any of said instructions, the defendant presented in the court in typewriting and asked the court to give to the jury, instructions Nos. 1, 2, and 3, but the court refused to give either of said instructions, and to that ruling of the court the defendant at the time exceoted and yet excepts.

(Said instructions offered by the defendant are as follows:)

252 I.

"GENTLEMEN OF THE JURY: It was the duty of the decedent, Edward Parker, to keep and maintain his proper position on the engine and to exercise ordinary care in performing his duties as fireman and in the business in which the railroad crew was engaged to save himself from injury, and if you believe from the evidence that he failed to keep and maintain his proper position on the engine or to exercise ordinary care in the performance of his duties in the business in which the said crew of which he was a member was engaged to protect himself from danger and but for his said failure he would not have been injured, or his said failure caused or aided in causing his injury, you should find for defendant.

2.

The court instructs the jury that the defendant Company was not an insurer of Edward Parker's safety or security from danger or injury at the time and place he was injured, and the mere fact that said Parker was fatally injured at said time and place is not to be considered by you as proving that defendant was negligent at said time or liable or blameable or responsible for said Parker's injury.

3.

If you shall believe from the evidence that Edward Parker was asleep on the engine at the time of his injury and said injury was caused by his being asleep at said time or aided in bringing
253 about his injury and but for which he would not have been injured, or, if you shall believe from the evidence that said Parker knew or could have known by the exercise of ordinary care of the position of the caboose in time to have avoided his injury and his failure to use ordinary care to avoid coming in contact with the caboose, caused or aided in causing his injury and but for which he would not have been injured, you should find for the defendant Company, although you may believe that defendant company or its agents and servants or any or either, failed to use ordinary care to place said caboose in the clear."

254 Knox Circuit Court.

NATHAN PARKER, Adm'r, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Certificate.

I, Flora E. Smith, official court reporter for Knox Circuit Court, do certify that the foregoing is a true and correct copy of all the evidence introduced and heard and offered to be introduced and rejected, and all objections and exceptions and avowals concerning same, during the trial of the case of Nathan Parker, Admr., versus The Louisville & Nashville Railroad Company, tried at the January term, 1914, of the Knox Circuit Court, on January 23rd, 1914.

Witness my hand, this the 5th day of March, 1914.

FLORA E. SMITH.

The foregoing transcript of testimony in the case of Nathan Parker, Admr. versus the Louisville & Nashville Railroad Company, has been examined and approved and attested by me as Judge before whom the trial was had, at the January term 1914, of the Knox circuit court.

Given under my hand, this the 7th day of May, 1914.

F. D. SAMPSON,
Judge Knox Circuit Court.

255 At the same time, to-wit, July 25, 1914, the appellant filed a statement under Section 739 of the Code, which is as follows:

256 LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
EDWARD PARKER'S ADMINISTRATOR, Appellee.

Appeal from the Knox Circuit Court.

Statement.

The names of the parties to this appeal are as stated in the caption. The judgment appealed from was rendered January 27, 1914, and will be found at page 38 of the Record. The appeal was granted below and no summons or warning order is necessary. J. M. Robsion, Barbourville, Ky., is appellee's attorney.

BLACK, BLACK & OWENS,
Barbourville, Ky.;
BENJAMIN D. WARFIELD,
Louisville, Ky.,
Counsel for Appellant.

July 15, 1914.

257 Afterwards at a Court of Appeals held at the Capitol in the City of Frankfort, Kentucky, on the 13th day of November, 1914, the following order was entered, herein, to-wit:

L. & N. R. R. CO.
vs.
EDWARD PARKER'S ADM'R.

Knox.

Ordered that this case be submitted.

Afterwards at a Court of Appeals held as aforesaid on the 18th day of June, 1915, the following orders and judgments were entered, to-wit:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
EDWARD PARKER'S ADMINISTRATOR, Appellee.

Appeal from Knox Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant his cost herein expended.

258 At the same time, to-wit, June 18, 1915, the said Court of Appeals delivered an opinion, which is in words and figures following, to-wit:

Court of Appeals of Kentucky, June 18, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
EDWARD PARKER'S ADMINISTRATOR, Appellee.

Appeal from Knox Circuit Court.

Opinion of the Court by Judge Turner, Affirming.

On the 30th of June, 1913, plaintiff's intestate, Edward Parker, while engaged as a fireman on a locomotive engaged in switching service in the yards of appellant at Middlesboro, Kentucky, was killed, and his administrator instituted this action against the Company for damages, alleging that his death was brought about through its negligence.

Upon a trial in the circuit court a verdict for $7000.00 for the plaintiff was returned, upon which judgment was entered, and the Company has appealed.

259 The original answer of the defendant consisted merely of a denial of the material allegations of the petition, but it subsequently filed an amendment, wherein it set up a plea of contributory negligence, and afterwards, during the trial, tendered a second amended answer, amplifying the plea of contributory negligence, but the court refused to permit the second amendment to be filed.

The evidence showed that in the yards of appellant at Middlesboro there were eleven tracks or switches, and that track No. 11 is known as the "lead track" from which and into which all of the other ten tracks or switches lead. On the night of the injury, and sometime before, the switching crew made up a local freight train, No. 86, which ran between Middlesboro, Ky., and Corbin, Ky., and the same was left standing on track No. 11 preparatory to being carried out the next morning. A caboose was attached to the rear of this train and was left standing on track No. 11 near to where it intersects with track No. 10, but not in the clear of engines or cars that might be run into track No. 10 from the other end of track No. 11. While this train, No. 86, and the caboose attached to it were so standing on track No. 11 the switching engine, upon which decedent was engaged as fireman, was directed to go into

260 track No. 10 from track No. 11, and while so going into track No. 10 Parker, while standing or sitting at his window in the cab of the engine, and possibly leaning out of the same, was struck on the head by coming in contact with the caboose or the marker attached thereto and was killed.

No one saw Parker at the time he was struck, but immediately afterwards he was found astraddle of his stool or bench and his

body leaning about half way out of the cab window. There was no injury upon any part of his body except his head, blood was found on both the engine and the caboose, the caboose showed signs of the collision, and the hand-rail of the engine was bent.

We entertain no doubt from the evidence that the caboose was not in the clear of an engine passing into track No. 10 from track No. 11, and that this was the cause of Parker's death.

It is apparent that at the time of the accident Parker's head was outside of the cab window, but it is shown by the record, and is admitted, that it was the duty of the fireman to keep a lookout for signals and convey them to the engineer; and while it is claimed for appellant that a short time before the accident Parker was seen with his head resting in the window and apparently asleep, there is other evidence tending to contradict this theory, and the
261 jury was justified in finding from all the evidence and all the facts that he, at the time of the injury, was engaged in the line of his duty.

The plaintiff's pleadings were based wholly upon the idea and assumption that Parker, at the time of his injury, was engaged in intrastate commerce, and that his administrator was entitled to recover under the State law The appellant, however, before it filed its answer, entered a motion to require the plaintiff to make his petition more definite and specific, and set forth in terms, whether he was proceeding under the State law or the Federal Act. The court properly overruled this motion, for the plaintiff's petition upon its face clearly indicated that he was proceeding under the State law, and upon the assumption that the intestate was at the time of his death engaged in intrastate commerce. That this action of the court was not prejudicial to appellant is apparent when it is considered that if at the conclusion of the testimony it had developed that Parker at the time of his injury was engaged in interstate commerce there could have been no recovery, and appellant would have been entitled to the peremptory instruction for which it asked.

The controlling question in this case is whether or not at the time of his injury Parker was engaged in interstate commerce, for if he was, it is conceded by the attorney for the appellee that there can be no recovery. This question must be determined from the
262 testimony of the yard foreman or conductor who had charge of the movement of all cars in the yard and one other witness, a brakeman, who testifies as to the destination of the car which was attached to the engine at the time of the injury. This brakeman on this point testifies as follows:

"Q. What were you going to do with the car you were putting m No. 10?

A. I think it was going to Mr. Hoe.

Q. Who is Mr. Hoe?

A. He runs a business.

Q. It was being put there in Middlesboro?

A. Yes, sir."

The yard foreman, Town, on this subject, testifies as follows:

"Q. What work did you and the yard crew have to do and were you preparing to do at the time Parker was injured?

A. We were down, going in No. 10 to get out a merchandise car for 89, a full car for No. 4 track and an empty box car for No. 5, and also had hold of the box car I was taking off there with me that was to the Furnace Mills.

Q. A merchandise car for 89, what is that?

263 A. A south bound local freight train that leaves Middlesboro in the morning.

Q. Where does it go?

A. Middlesboro to Norton Virginia.

Q. Do you remember the number of the merchandise car that you were getting off that was to be put in train 89 running to Norton?

A. I do not like to make a sworn statement, it was M. C. 13406 or 13506, or 13306.

Q. Refer to your records if you have them, and tell the jury the exact number and name of the car for which you were going and when it was to be placed in train 89?

A. M. C. 13908.

Q. Do you know of your own personal knowledge as to what that car had in it?

A. Had various articles; shipments of everything in it for points on the south end of the C. V. division; at least that was my remembrance; it was a merchandise car.

Q. Did you see the way bills?

A. No, sir, I did not handle the way bills?

Q. Of course you did not open the car?

A. No, sir.

Q. Do you know it was a merchandise car for some point in Tennessee or Virginia?

A. Tennessee or Virginia.

Q. Where was that car that contained that merchandise destined for, points in Virginia or Tennessee?

A. It was down some 12 or 15 car lengths down on track

264 No. 10.

Q. The same crew with which your engine was moving, on the same track on which your engine was moving at the time Parker was injured?

A. Yes, sir.

Q. Tell the jury whether or not it was or was not part of the duties of the yard crew of which Parker was a member to take and place this car containing this merchandise for Virginia and Tennessee on train 89 destined for these points.

A. Yes, sir.

Q. Do you know from the billing or from your personal knowledge where this car had come from or in what train it came to Middlesboro?

A. It came to Middlesboro in train 89, the night previous to my handling.

Q. Between what points did train 85 run?

A. From Corbin, Kentucky, to Middlesboro, Kentucky.

Q. Where was M. C. 13908 placed, in what train?
A. Train 89.
Q. If I understand you, you went into track 10, and intended to move this car for train 89 at the time Mr. Parker was injured?
A. Yes, sir.
Q. Tell the jury whether or not this car did go into train 89 that run between Middlesboro and Norton, Virginia?
A. Yes, sir. I placed the car in train 89, whether it departed from Middlesboro on that date, I cannot say.
Q. Tell the jury whether or not taking this car from track
265 10 and placing it in train 89 was a part of the work assigned to you and the yard crew of which Parker was a member on the night on which Parker was injured?
A. Yes, sir.
Q. Tell the jury whether or not that car was on the original switch list which you received at or prior to the time you and the other members of the crew went on duty that night?
A. Yes, sir."
Again on cross examination he says:
"Q. At the time Parker was killed the engine was backing into 10 approaching a box car?
A. Yes, sir.
Q. What box car was that?
A. It was an L. & N. empty going to J. R. Hoe, I believe it was consigned.
Q. That a place in Middlesboro?
A. Yes, sir.
Q. In this state?
A. Yes, sir.
Q. And where was this train going that was in 11, No. 86 train and caboose.
A. It was going to Corbin the next morning.
Q. Middlesboro is a freight division point is it?
A. It is a sub division for locals.
Q. Local freights run between Middlesboro and Corbin, Ky.?
A. Yes, sir.
Q. Freight locals that run from Middlesboro to Norton,
266 Virginia?
A. Yes, sir.
Q. And these two local divisions make up the C. V. Division?
A. Yes, sir; Middlesboro is a sub-division.
Q. I notice this car you say 13908 M. C. on your card that you have introduced here, which you say was the instructions given you that night, and under another division of the car it reads, under the head of the Division of destination, it reads 89?
A. Yes, sir.
Q. What does that mean?
A. That car goes on 89.
Q. So far as your crew was concerned and so far as Parker was concerned, if that was to be moved at all, it was to be moved from No. 10 to 89 train?

A. Yes, sir.

Q. And that was its destination so far as your crew was concerned?

A. Yes, sir.

Q. But that car was not moved that night before Parker was killed, I mean car 13908, M. C. 89, it was not moved that night before Parker was killed?

A. No, sir.

Q. So what you are talking about this car 13908 M. C., destination 89, tonnage 10, that was a car you moved after Parker was killed and put it into 89 train?

267 A. Yes, sir.

Q. This car that was attached to the engine, where did you put it after Parker was killed?

A. I taken it along up in the morning after sometime between that time and time I was quitting next morning, taken it over to the furnace.

Q. That is in Middlesboro?

A. Yes, sir.

Q. And near these yards?

A. Yes, sir.

Q. How many cars were between it and the car you were moving for the local trade, there at Middlesboro, and this car 13908 M. C. 89?

A. 12 or 15; might have been that many I do not know the exact number."

As we gather from this testimony, at the time of the injury to Parker the engine upon which he was at work, was attached to a single empty car, the destination of which was within this state; that the engine and this car were at the time going into track No. 10 for the purpose of removing some 12 or 15 cars, which were on that track, which had to be removed before the interstate car could be reached and placed on another track in a train so that it might proceed upon its interstate journey. In other words at the time of the injury only an intrastate car was attached to the engine, and the engine was engaged in switching this intra-

268 state car from one part of the yard to another, and expected shortly thereafter to remove from track No. 10 some 12 or 15 cars so that it might switch the interstate car to another track. That is it was engaged at the time in switching intrastate cars so that it might ultimately get at and switch to another track the interstate car.

As a matter of practical knowledge we know that in railroad switching-yards the switch engines are constantly engaged in switching both interstate and intrastate cars, and if it can be said as a matter of law that the crew of a switch engine, which is actually engaged in moving intrastate cars as preliminary to the ultimate moving of interstate cars, is then engaged in interstate commerce, there would never be a time when a switching crew would not be engaged in such commerce, in any railroad yards of any size. If a switching crew may be held to be engaged in interstate com-

merce when it is only handling intrastate cars merely because the yard foreman has orders sometime during that day or night to remove an interstate car from one part of the yard to another, and the removal of the intrastate cars is to be held merely preliminary to the ultimate removal of the interstate car, we are at loss to understand when and under what circumstances such a crew could
269 be held to ever be engaged in intrastate commerce.

The true test is what character of commerce was the employe engaged in at the time of his injury, and not whether he was engaged at the time in one kind of commerce as a preliminary to the engagement in another kind.

Suppose at the time of Parker's injury there had been attached an interstate car to the engine, and it was being switched from one part of the yard to another with the preliminary purpose of removing an intrastate car from one part of the yard to another, would a contention that it was then engaged in intrastate commerce merely because of the purpose in the near future to so engage be considered for a moment?

The case of North Carolina Railroad Co. v. Zackary, 232 U. S. 248, is not in conflict, as we understand it, with the views herein expressed. In that case a fireman on an engine which had already been prepared by him for an interstate journey and was about to depart, was killed while he had temporarily left his engine a short time before its departure. The court in that case in holding that the fireman was engaged in interstate commerce, said:

"It seems to us, however, that his acts in inspecting, oiling, firing, and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstances that the interstate freight cars had not as yet been coupled
270 up is legally insignificant. See Pederso*b* v. Del. Lac. & Western R. Co. 229 U. S. 146, 151; St. Louis & San F. Ry. v. Seale, 229 U. S. 156, 161."

The case of Illinois Central R. R. v. Behrens, 233 U. S. 473, is very much like this. There the employe was engaged in switching intrastate cars, but was expected shortly to be engaged in interstate commerce. The court in holding that he was engaged only in intrastate commerce, said:

"Giving to the words "suffering injury while he is employed by such carrier in such commerce" their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce. The act was so construed in Pederson v. Delaware, Lackawan-a & Western Railroad Company, 229 U. S. 146. It was there said, (p. 150): "There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employe is employed by the carrier in such commerce." Again (p. 152) "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" And a like view is shown in other cases.

Mondou v. New York, New Haven and Hartford Railroad
271 Company, supra; Seaboard Air Line Railway v. Moore, 228 U. S. 433; St. Louis, San — & Texas Railroad Co. v. Seale, 229 U. S. 156, 158; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 256; Grand Trunk Western Ry. Co. v. Lindsay, ante, p. 42.

"Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

We think the concluding sentence quoted in the Behrens case is conclusive of this case.

The complaint that the court erred in refusing to permit the second amendment to be filed has no merit; the plea of contributory negligence had already been made and this amendment was merely intended as a perfection of the plea by reference to certain evidence that had been given.

272 An examination of the instructions shows that the issue was fairly submitted, and that no just complaint can be made of them.

Perceiving no prejudicial error in the record the judgment is affirmed.

Benjamin D. Warfield, Louisville, Ky.; Black, Black & Owens, Barbourville, Ky., For Appellant.

J. M. Robsion, Barbourville, Ky., For Appellee.

[Endorsed:] June 18/15. L. & N. R. R. v. Parker's Adm'r.

273 Afterwards on the 12th day of July, 1915, the appellant in vacation filed in the clerk's office of said court a petition for rehearing with notice.

Afterwards at a Court of Appeals held as aforesaid on September 20, 1915, the following order was entered herein, to-wit:

L. & N. R. R. Co.
vs.
PARKER'S ADM'R.

Knox.

Came the appellant by counsel and filed a petition with notice and moved the court to grant a rehearing, to which petition appellee filed a response and the case is now submitted.

The following is the petition for rehearing filed by the foregoing order:

274 Court of Appeals of Kentucky, Fall Term, 1914.

No. 362.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
EDWARD PARKER'S ADMINISTRATOR, Appellee.

Appeal from the Knox Circuit Court.

Appellant's Petition for Rehearing.

The opinion is in 165 Kentucky, 658.

We will discuss only one question in this petition for rehearing: as to whether or not this court was in error in holding that decedent was employed in intrastate commerce at the time he was injured. If he was not, then, as the opinion holds, there can be no recovery, and appellant was entitled to the peremptory instruction for which it asked.

The opinion accurately copies most of the testimony shown by the record on this point. But, for reasons now to be stated, we think the court made an erroneous deduction from the testimony so quoted, in holding that it showed that decedent was engaged in intrastate commerce. And we think there is other testimony given by switch-foreman Town, succeeding that quoted in the opinion, which sheds light upon the question we are considering. For example, the
275 court quotes the testimony showing that at the time of the accident the switch engine had hold of but one car, which was empty, and that it was to be switched to the business place of Mr. Hoe, in Middlesborough. And it is this car which the court holds determines the question as to the commerce in which decedent was engaged when he was hurt. While the quotation made from Town's evidence in the opinion shows that the empty car then attached to the engine was not switched to Hoe's place until the next day, the opinion seems to treat the movement of the empty car at the time of the accident as having to do with the switching of that car to Hoe's place. This, we think, is a misconception of the evidence. The car was not then being moved because it was being switched to its destination in Middlesborough, but was being moved to get it out of the way so that the engine could get the M. C. car 13908 loaded with interstate commerce, shipped from Knoxville, Tenn., via Kentucky, back into Tennessee and thence to Virginia. And the same is true as to the 12 or 15 cars which were standing on track No. 10, between the switch engine and the M. C. car. The only occasion for the engine then moving either the empty car attached to it or those 12 or 15 cars was to get them out of the way, so that the engine could get the M. C. car and place it on train 89, which was then being made up by the switching crew, including Parker and Town, and which train 89 was to be moved in interstate commerce

from Middlesborough, Ky., to points in Tennessee and Virginia the next morning. For example, immediately following that part of Town's testimony, with which the quotation therefrom in the
276 opinion closes, Town was asked on cross-examination if he could state the numbers of any of the cars in track No. 10, which had to be moved to get the M. C. car. Town replied he could not. Then this occurs:

"Q. And they were not to be moved at all?

A. Not by me; no, sir.

Q. How were you to go about getting that freight car (M. C. 13908)?

A. I was to couple to them and move that out and they went back in No. 10 and staid. * * * (Tr., p. 142.)"

Again, on cross-examination, Town was asked concerning the orders he had given under which the switching movement was being made at the time decedent was injured:

"Q. You did not know that car (the empty car attached to the engine) was being put in No. 10?

A. Certainly I did, or I am satisfied it would not have been put in there.

Q. Did you order it put in there?

A. I ordered them to go in No. 10 and bring out a cut of cars."

Again (Tr., p. 158) Town was asked on cross-examination as to the switchman who accompanied the empty car attached to the engine, and as to where the switchman was and what he was doing, and answered:

"A. I do not know whether he was hanging on the side or end (of the car), but my impression (is) he was walking on the ground fixing to make a coupling.

Q. Coupling to what?

A. Cut *the* (of) cars in 10.

Q. How far did you have to go in 10 before you got to these cars?

A. I do not know, 100 feet probably, maybe not so much."

277 And again, as illustrating the very erroneous conception by appellee's counsel as to what constitutes employment in interstate commerce, note his question asked Town on cross-examination (Tr., p. 160):

"Q. If this car was 13908 M. C. that you say that was being put in local 89, and which might have gone to some other State, would Parker, under his duties, — had anything to do with moving that car out of the State after it was put in train 89?

A. No, sir; I do not suppose he would. * * *

Q. That was the destination of your car, so far as your crew is concerned?

(Objection sustained.)

Q. Did your crew have any duty or right to move that car on the 89 further than on the tracks in Middlesborough?

A. No sir; not unless we received instructions."

According to this test, no member of a switching crew would ever be engaged in interstate commerce. A wholly inadmissible suggestion.

And again, on Town's redirect examination (Tr., p. 162), after testifying to a number of other cars on his switch list which he was to place in train 89, this occurs:

"Q. If I understand you, at the time you were moving into track 10 you had an empty box car attached to your engine, merely because it was in your line of movement?

A. Yes, sir.

Q. And you sometime during the next morning placed that empty box car at some industrial track in Middlesborough?

A. Yes, sir.

Q. If I understand you, there were more cars between M. C. No. 13908, and they were probably dead cars; that is to say, cars for which you had no destination, just standing in the yard?

A. Yes, sir.

278 Q. And I believe you say, of course, it was necessary to hook to them and first move them before you could reach or get car M. C. No. 13908 for train 89?

A. Yes, sir.

Q. These cars were merely standing on the track between your engine and M. C. No. 13908, if I understand you?

A. Yes, sir.

Q. Tell the jury whether or not the persons who controlled the engine and equipments that moved train 89 from Middlesboro to points in Virginia and Tennessee had anything at all to do with making up the train and taking this car from the siding and placing it into that train, or whether that was the duty of the yard crew of which Parker was a member?

A. It was the duty of the yard crew to make up that train.

Q. The crew in charge of train 89 after that train had been made up simply picked up the train and moved it out after it was made up by your yard crew?

A. Yes, sir."

And again, in Town's recross-examination, as indicating the mental attitude of appellee's counsel toward interstate commerce, this occurs (Tr., p. 164):

"Q. If Parker had anything to do with these three empties and loaded car you have been asked about, he would not have had anything to do with taking them into another State?

A. No, sir; only got them on 89.

Q. That would have been the destination, so far as your crew is concerned?

A. Yes, sir.

Q. He would have been still in Middlesborough in this State?

A. Yes, sir."

Inasmuch as the opinion concedes that M. C. car 13908 was then engaged in interstate commerce, it is not necessary for us to notice, in detail, the testimony, next succeeding that of Town, of bill clerk S. H. Adams, of Knoxville, Tenn., who loaded that car at Knoxville, on June 28, 1913, with freight for Wheeler, Va., Rose Hill,

279 Va., Dorchester Junction, Va., Stonega, Va., Appalachia, Va., and Mendota, Va., and also for Shawnee, Tenn., and

all of which points could only be reached, over defendant's lines, by a train moving from Knoxville, Tenn., to Corbin, Ky., thence to Middlesborough, and thence back into Tennessee, and thence into Virginia. And none of the freight in the car was destined to Kentucky points or to any point short of Shawnee, Tenn.

Nor, for the same reason, is it necessary to notice, in detail, the testimony of conductor T. B. Colson, of train 85, which handled M. C. car 13908 from Corbin to Middlesborough, June 29, 1913, and of conductor H. E. Harris, who handled the same car from Middlesborough, Ky., to Appalachia, Va., and through the States of Kentucky, Tennessee and Virginia, in local train 89, July 1, 1913, and the seals of which car were not broken until the train reached Shawnee, Tenn., showing that no freight was removed from the car until it had passed out of Kentucky into Tennessee, en route to Virginia.

We submit, that taking the testimony as quoted in the opinion in connection with that which we have quoted from the record in this petition, but which is not quoted in the opinion, that it is conclusively established that the switching movement which was being made at the time decedent was hurt was not for the purpose of switching the empty car then attached to the engine to any destination, but was merely for the purpose of getting it out of the way, so that the engine could get to the interstate car; and that the same is true of the other cars standing on track No. 10, ahead of
280 the interstate car. In other words, it seems to us that the fact that the ultimate destination of the empty car was to Hoe's siding, in Middlesborough, and to which the court attaches controlling significance, is without any real significance. And the same is true as to the other intrastate cars then standing on track 10, between the engine and the interstate car. The switching movement was not for the ultimate purpose of switching the interstate car, but was for the direct and immediate purpose of switching the interstate car. None of the other cars would have been moved at all at that time, except to get them out of the way, so that the engine could couple to the interstate car and pull it out and attach it to train 89. And it is right here, as it seems to us, that the court falls into error in its opinion—it treats the movement of the empty cars, in order to get at the interstate car, as though it were a definite switching movement of the empty cars to points of destination in Middlesborough, and, therefore, intrastate transportation. Whereas, as Town's testimony clearly shows, he was not at that time proposing to move any of those empty cars to or in the direction of their destinations. He did not move the empty car the engine then had hold of to its destination at Hoe's siding until the next morning. And he did not move the empty cars between the engine and the interstate car on track 10 at all, except to get them out of the way of the interstate car. In other words, after he pulled the interstate car out of track 10 and put it on train 89, he put the remaining cars, which he had pulled out to get at the interstate car, back on track No. 10 and left them there, and never switched them to destina-
281 tion at all. This, if done by any one, was done by some other crew on some other day.

Therefore, even if the Supreme Court of the United States had not decided the case to which we are about to refer, and, if we had had no other light upon the question than is contained in previous opinions of the Supreme Court, some of which are referred to in the opinion of this court, we should nevertheless have felt it our duty to ask the court to reconsider its decision in this case and to hold that decedent was engaged in interstate commerce at the time he was hurt.

But, on June 14, 1915, four days before this case was decided, the Supreme Court of the United States decided the case of New York Central & Hudson River R. R. Co. v. Bernard J. Carr. The unanimous opinion of the court was delivered by Mr. Justice Lamar in these words:

"Carr was a brakeman on a 'pick-up' freight train running from Rochester to Lockport over the lines of the New York Central. On November 18, 1910, some of the cars in this train contained interstate freight. Among those engaged in purely intrastate business were the two cars, at the head of the train and next to the engine, which were to be left at North Tonawanda, New York. On arriving at that point they were uncoupled from the train, pulled by the engine down the track, and then back into a siding. It was the duty of one brakeman (O'Brien) to uncouple the air hose from the engine, and for the other (Carr) to set the hand-brakes in order to prevent the two cars from rolling down upon the main track. O'Brien, having failed to open the gauge to the stop-cock, suddenly and negligently 'broke' the air hose. The result was that the sudden escape of air—applied only in cases of emergency—violently
282 turned the wheel handle attached to the brake which Carr at the time was attempting to set. The wrench threw Carr to the ground and for the injuries thus suffered he brought suit in a State Court. If the case was to be governed by the law of New York he was not entitled to recover, since the injury was due to the negligence of O'Brien, a fellow-servant. He did recover a verdict under the Federal Employers' Liability Act and the judgment thereon having been affirmed (157 App. Div. 941; 158 App. Div. 891) the case is here on writ of error to review that ruling.

"The railroad company insists, that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr while working thereon was engaged in intrastate commerce and not entitled to recover under the Federal Employers' Liability Act. The scope of that statue is so broad that it covers a vast field about which there can be no discussion. But, owing to the fact that, during the same day, railroad employes often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from the interstate business. The present case is an instance of that kind—and many arguments have been advanced by the railway company to support its contention that, as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position

of the employe at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. St. Louis, etc., R'y v. Seale, 229 U. S. 156; North Carolina R. R. v. Zachary, 232 U. S. 248. This case is within the principle of those two decisions.

283 "The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate train and proceed with it, with Carr and the other interstate employes, on its interstate journey.

"The case is entirely different from that of Illinois Central R. R. Co. v. Behrens, 233 U. S. 473, for there the train of empty cars was running between two points in the same State. The fact that they might soon thereafter be used in interstate business did not affect their interstate status at the time of the injury; for, if the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles, the effect would be to give every car on the line that character. Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. Under these principles the plaintiff is to be treated as having been employed in interstate commerce at the time of his injury and the judgment in his favor must be affirmed."

Of course, neither this Court nor ourselves had seen the opinion in the Carr case, nor knew of it, until after this case was decided. Hence, there was no opportunity to bring the opinion in the Carr case to the attention of the Court on the original hearing of the case at bar. Otherwise, we would certainly have done so.

If, as the Supreme Court holds, Carr, who was a brakeman on a train the termini of which were both in the State of New

284 York, and who, when injured, was switching two cars, moving in intrastate commerce, out of the train, was nevertheless engaged in interstate commerce, merely because there was some freight on the train moving in such commerce, then it is impossible, it seems to us, to avoid the conclusion that decedent, in the case at bar, was engaged in interstate commerce in going after M. C. car 13908 at the time he was hurt, notwithstanding the fact that the engine then had hold of an empty car, and which was to be coupled on to other empty cars before the M. C. car could be reached, and which empty cars were not then engaged in interstate commerce, and were not being moved to a destination in any commerce at that time.

And, as opposed to the narrow construction appellee's counsel have

given the Federal Act, note the language of the Supreme Court in the Carr opinion that the scope of the Federal Employers' Liability Act "is so broad that it covers a vast field about which there can be no discussion." And note, also, this further language in the Carr opinion:

"* * * many arguments have been advanced by the railway company to support its contention that, as these two cars had been cut out of the interstate train (only interstate, because it contained some interstate freight) and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employe at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty * * * he is entitled to the benefits of the
285 Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars."

In principle, that is this case.

See, also, Lamphere v. Oregon R. & N. Co., et al., 196 Fed. Rep. 336, which, while it did not reach the United States Supreme Court, was referred to approvingly by that court in Pedersen v. D. L. & W. R. Co., 229 U. S. 146. Lamphere was injured at a road crossing while on his way on foot to a station to board a train as a passenger to go to another point on the railroad to assume duties as a member of a crew of an interstate train. The District Court held that Lamphere was not covered by the Federal Act and dismissed his petition. But the Circuit Court of Appeals for the Ninth Circuit reversed the judgment and held that Lamphere was engaged in interstate commerce by virtue of the fact that he was then on his way to take employment on a train engaged in such commerce. Certainly, Parker, who was not on his way to work, but was actually at work on the switch engine which was going after the M. C. car loaded with interstate commerce, and no other commerce, was much more definitely and unmistakably engaged in interstate commerce when he was hurt than was Lamphere.

We respectfully ask that the court reconsider its opinion, in the light of the opinions in the Carr, Lamphere and Pedersen cases and of the argument herein made, and that, upon such reconsideration, the court grant the rehearing herein asked for, withdraw the opinion affirming the judgment below, and deliver another opinion reversing such judgment and holding that, inasmuch as decedent
286 was engaged in interstate commerce at the time he received his hurt there can be no recovery for his death, and that the trial court should have given the peremptory instruction asked by defendant—this being what the court held defendant is entitled to, if decedent was engaged in interstate commerce when he received his hurt.

Respectfully submitted,

BLACK, BLACK & OWENS,
BENJAMIN D. WARFIELD,
Counsel for Appellant.

July 8, 1915.

287 The following is the response to the foregoing petition filed by the order of September 20, 1915:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
EDWARD PARKER'S ADMINISTRATOR, Appellee.

Response to Petition for Rehearing.

Appellant's counsel have filed a petition for rehearing in this case, and asked that the opinion delivered in this case affirming the Judgment of the Knox Circuit Court, be withdrawn and that another opinion be delivered reversing the Judgment of the Knox Circuit Court.

The only question discussed in this petition for rehearing is, whether or not Edward Parker at the time of his death, was or was not, engaged in intrastate Commerce.

This question was thoroughly discussed in briefs by Counsel for both parties. In fact, appellant filed a long brief and then a reply brief, of considerable length as we remember it, and after the case was submitted, we agreed for appellant's counsel to file an additional brief citing more authority on this same question.

In the Petition for Rehearing nothing new is attempted to be offered, and except the citation of the case of New York Central and Hudson River R. R. Co. vs. Carr, we cannot see where appellant's counsel can get one grain of comfort from this opinion. Undoubtedly it sustains the appellee, and the opinion of the Court handed
288 down by Judge Turner, in this case. Appellant's Counsel failed to note any distinction between the fellow employed on the switch yards, within the State, and the man who is employed on an Interstate Train.

The decedent Parker, was employed on the Switch Yards at Middlesboro, Ky., and he had no part in moving any train or car except within the State. Carr in the opinion cited by appellant's counsel, was employed on an interstate train, and he was injured in perfomr-some of his duties while the train was making its interstate journey, and the two cars which Mr. Carr, was handling were interstate cars, and engaged in Interstate commerce. They were part of the interstate train. They had been engaged in an interstate journey. Mr. Carr's employment required that he serve on this train and that it travel from a point in one State, to a point in another state, and every act, and effort upon the part of Mr. Carr were done and performed in furtherance of this Interstate trip, and to carry this Interstate Train, with Interstate Cars, to its destination. There is as much difference in the Carr case, and the case at Bar, as there is difference between day and night. We do not know all the facts proven in that case, but from the statement in the opinion, these cars had never been uncoupled from this engine at the time of the accident. Mr. Justice Lamar uses this language:

"The plaintiff was a brakeman on an interstate train. In performing this duty, it was necessary to set the brake of the car still attached to the interstate engine."

It is easy to determine in what commerce the brakeman Carr was engaged. He was employed to aid in taking an interstate train from a point in one State to a point in another state, and each act performed by him in his line of duty was in aid of and in furtherance of the work to carry that interstate train to its destination.

289

A man like Parker working on switch yards, unless the work he was engaged *at* at the moment is to be the measure or criterion, by which to determine in what service he was engaged, there would be no way to determine this.

If, as contended by appellant's counsel, this should be determined by some act in the future, it would be impossible to say in what commerce he was engaged.

When Parker began work in the Evening, the yard conductor Towne had orders to move cars that night engaged in intrastate commerce, as well as those engaged in interstate commerce, so that if you look to future acts and future orders, and future intents, it could be argued more strongly that he was engaged in intrastate commerce.

They had been engaged all the evening in making up a train that would travel from Middlesboro, Kentucky to Corbin Kentucky. They had orders at the time Parker was killed, to move and switch various cars to industrial tracks in Middlesboro.

If the law should be held to be as claimed by defendant's counsel, the plaintiff never would know, and could not learn until the case was completed in what sort of commerce his client was engaged at the time he was injured.

If the suit should be brought under the Federal Act, and they should happen to be handling an interstate car at the time of course it would be claimed, that they were switching this interstate car, for the purpose of getting out an intrastate car, and would contend that the servant was engaged in intrastate commerce at the time he was injured, because it was their purpose to reach an intrastate car. The injured servant could never fix the responsibility or obtain any relief. We have no doubt at all, but what the defense in this case is based upon a falsehood. After this man was killed, it was discovered that there was an interstate car sitting on track No. 19, in the rear of some twelve of fifteen other cars, and spoken of in the record as "Dead cars," that is, cars that were empty and were to be switched and distributed to various industrial concerns in Middlesboro. To move these twelve or fifteen cars and distribute them, would be intrastate commerce, and of course the railroad would not claim that their purpose was to distribute either of these twelve or fifteen cars at that time. They must claim that their only purpose at that time was to get these 12 or 15 cars out of the way so that they could reach this alleged intrastate commerce car, M. C. 13908.

290

To show the fallacy of this contention, as well as the fraud and

deceit, Why did the defendant take this car from switch No. 4 down lead track No. 11, to take these 12 or 15 dead cars out, and then place this empty box car that was taken from "4" and these 12 or 15 dead cars in some other track in order to go back and get to this alleged interstate car.

The facts and circumstances show conclusively that they were attempting to put this empty box car that was attached to the engine at the time Parker was hurt into No. 10. No other kind of car was attached to it. This injury occur-ed about 10 o'clock at night. This alleged interstate car was not taken out of that track No. 10 until some time next Morning. Yet, according to the contention of the railroad, it was in order at that time, to take 12 or 15 dead cars out of No. 10, and place them in another track, and go back immediately, and get this alleged interstate car. Yet,
291 with all this push and rush to get this interstate car, as they claim at the time Parker was injured, they did not take it out until some time next Morning. Several hours after Parker was killed.

This shows clearly that this alleged claim of the railroad company is merely a fiction of the mind, and an effort to try to get this case within the Federal Act.

Had we filed suit under the Federal Statute, we would never have heard of this alleged interstate car M. C. 13908 behind 12 or 15 dead cars. Counsel for the defendant would have argued loud and long that the railroad was engaged in intrastate commerce at the time Parker was killed.

It is admitted that his engine was moving an intrastate car at the time he was injured and killed, and it is further admitted that before Parker was injured — engine could have touched the alleged interstate car, that the crew would have had to move these 12 or 15 dead cars. Now these 12 or 15 cars were destined to industrial tracks there in Middlesboro. When did the railroad propose to place these 12 or 15 cars to the various industrial concerns in Middlesboro?

Had we brought this action under the Federal Statute no doubt, we could have had considerable information as to when and where these various dead cars would be placed and moved, before they had any intention or purpose of handling this alleged interstate car M. C. 13908. Yes, the witnesses would have stated loud and long, that this dead car and that dead car were to be placed at this concern and that concern, long before it could take hold of this interstate car.

But since the plaintiff has brought his suit under the state law, we hear a great deal said about the intention of the railroad company. We rather prefer to Judge the railroad company by
292 their acts. Why, did the railroad company take this empty box car from No. 4 in the other end of the yard and switch it into No. 10, *is* their only purpose was to go into No. 10 and get these twelve or fifteen "Dead Cars," and remove these dead cars in order to get at this alleged interstate car.

If they wanted to get this interstate car, why go to another part of the yard and get an empty box car, to place between the engine and

these twelve or fifteen dead cars. Why not go directly into No. 10, and pull out the twelve or fifteen dead cars with the interstate car attached. Reason and common sense are both opposed to the position of the defendant. This young man was butchered by the gross negligence of conductor Towns, and he is now trying to shield his own misconduct, and protect the railroad, and to aid the railroad in satisfying the demands of the law for the death of this young man.

In the case of a yard switching crew, if the future duties or purposes of the yard crew are to control, then it could be argued that the plaintiff's intestate would be required to place these 12 or 15 dead cars on industrial tracks, and not in interstate commerce, and for that reason it should be held that he was engaged in intrastate commerce at the time he was injured. As well said by Judge Turner in his opinion in this case there is a difference between the servant working in the railroad yards in which he is required to handle interstate and intrastate cars constantly, and the character of the cars handled by him changes every minute or so or oftener, and the servant employed on the train. We shall not enter into a discussion of the facts because we have gone into that fully in our brief filed in this case, and again the opinion of Judge Turner shows a careful reading of the record and a mastery of the facts, as well as a careful consideration of the cases cited, by counsel for both
293 parties. The opinion of Judge Turner is devoted largely to the discussion of the question raised in the petition for rehearing, and the reasons for affirming this case appear to be so sound and so clearly stated that it would be impossible for us to make it any more clear. The opinion of Judge Turner is certainly sustained by the law and the facts.

The reading of this record will show one of the worst cases of negligence that has ever come before this Court. The negligence was so gross that it borders on the criminal, and it would be a travesty upon justice to permit the railroad company to escape responsibility for this young man's death. Of course that would be the effect of it if this opinion is withdrawn, and this case reversed. And upon the ridiculous contention, that the railroad company was taking this empty box car from track No. 4 down into track No. 10, in order to get out twelve or 15 dead cars, and then to return and get this alleged interstate car M. C. 13908.

Why should a box car be taken from another track and attached to the engine, to go into another switch, to get 12 or 15 empty cars, in order, later on to get a loaded car?

What hurts the defendant in this case, is that at the time of the injury they were moving an intrastate empty box car. They were moving it from Track No. 4 to Track No. 10, and it was to be placed at J. Hoe & Sons' factory. They never had touched these 12 or 15 empty cars on No. 10. These 12 or 15 empty cars on Number 10, had to come out before they could reach this alleged interstate car. They were making an intrastate movement at the time Parker was killed and according to their own contention, they would have had to have made another intrastate movement of Intrastate cars, be-

fore they would have been in position to start on a trip for the alleged interstate car.

294 This whole defense is manufactured in our opinion from top to bottom, and the fellows who manufactured it made a bunglesome job of it.

Justice has taken place in a measure in this case. Parker was a young, sober, industrious man. Earning good wages, and the judgment is much too small. The opinion in this case should stand.

Respectfully submitted.

J. M. ROBSION,
Counsel for Appellee.

294*a* The following is a copy of appellant's reply to appellee's response to appellant's petition for rehearing:—

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus
EDWARD PARKER'S ADM'R, Appellee.

Appealed from the Knox Circuit Court.

Appellant's Reply to Appellee's Response to Appellant's Petition for Rehearing.

On reading the response to our petition for rehearing in this case, we are reminded of something that was said in an address we heard delivered by Mr. John B. Rodes, of Bowling Green, Kentucky, at the last annual meeting held about two months ago, at Frankfort, Kentucky, of the Kentucky State Bar Association. Mr. Rodes' theme was "Some Great Lawyers of Kentucky, Joseph Rogers Underwood and Elijah Hise.f' It was a scholarly and masterly address, and must have been profoundly interesting to every Kentucky lawyer who heard the address delivered, or who has been fortunate enough to have the opportunity to read it in print. During the course of his remarks concerning Judge Hise, sometime a member of this Court, and also at one time a member of Congress from the Third Kentucky District, Mr. Rodes said:

"* * * Among the traditions in my section of the State which hang around the name of Hise, though I doubt it was original with him, is the following anecdote: A lawyer of Greenville, Ky., by name of Pittman, had the habit of playing the witness in his own cases. On one occasion when Judge Hise came to address the jury, he said: 'I have known my friend, Pittman, a long time, and have watched his professional career with great interest. I regret to say that while he has not succeeded in making of himself much of a lawyer, he has become damned dangerous as a witness.'"

294*b* The learned author of the response to our petition for rehearing, like Pittman, is more dangerous as a witness than he

is as a lawyer. And this criticism applies both to his attempt to state the facts on which the Carr case was decided, as well as to his attempt to state the circumstances under which Parker was injured.

Our learned opponent must have read the opinion in the Car case, with indifferent attention. Otherwise, he would not have stated in his response to the petition for rehearing that Carr was employed on an interstate train when it is definitely stated in Justice Lamar's opinion that the train on which Carr was a brakeman was "a 'pick-up' freight train running from Rochester to Lockport over the lines of the New York Central." Both Rochester and Lockport are in the State of New York. So far as the movement of that train was concerned, it was wholly intrastate. The crew did not leave the State of New York from the time they started out on the trip until they got to their destination. Therefore, the train was not an interstate train, in any such sense as it is asserted in the response to the petition for rehearing. And, in that sense, Carr was not engaged in interstate commerce one whit more than was Parker.

Again, it is stated in the response to the petition for rehearing that the train was making an interstate journey. It was not. It was making wholly an intrastate journey.

Again, it is stated in the response to the petition for rehearing that "the two cars which Mr. Carr was handling were interstate cars, and engaged in interstate commerce." They were not. It is distinctly stated in Justice Lamar's opinion that the two cars in the switching of which at North Tonawanda, N. Y., Mr. Carr was engaged at the time he was hurt, were "engaged in purely intrastate business."

294c The Supreme Court held that Carr was engaged in interstate commerce at the time he received the hurt, not because the termini of the train were in different States, because such termini were in the same State; not because the two cars Carr was assisting in switching at the time he was hurt were moving in interstate commerce, or contained interstate commerce, because, as the opinion recites, they were engaged in purely intrastate business; but because some of the freight on the train thus moving intrastate—but which freight was not in the cars Carr was assisting in switching at the time he was hurt—was moving in interstate commerce. That is the sole reason why the Supreme Court held that Carr, at the time he received his hurt, was engaged in interstate commerce, and that his case fell within the Federal Employers' Liability Act, and which was exclusive of all other remedies.

Again, it is recited in the response to the petition for rehearing that the train was moving from a point in one State to a point in another State. This statement, as we have seen, is directly in the teeth of the express language of the opinion.

Again, it is stated in the response that "every act, and effort upon the part of Mr. Carr were done and performed in furtherance of this interstate trip, and to carry this interstate train, with interstate cars, to its destination." A more inaccurate statement of the facts in the Carr case could hardly be made, as we have already shown, and as the opinion of the Supreme Court, in that case, quoted in full in our

original petition for rehearing, also plainly and conclusively shows. That opinion will now be found printed in Lawyers' Reports, Advance Opinions, United States Supreme Court Pamphlet, No. 16, July 15, 1915, page 780.

Again, it is stated in the response that the two cars Carr was assisting in switching when he was hurt, had never been uncoupled from the engine at the time of the accident. The opinion does
294*d* not show how this was. But the opinion does expressly show that the two cars had been uncoupled from the rest of the train, that they were pulled by the engine down the track and then back into a siding, so that it clearly appears from the opinion that the engine and the two intrastate cars had been detached from the rest of the train and were moving on a different track from that on which the rest of the train stood. In other words, it clearly appears from the opinion that the only movement that was being made by the engine at the time Carr was hurt, was the moving of the two cars which the opinion recites were "engaged in purely intrastate business." So much for some of the very inaccurate statements contained in the response, as to what the facts were in the Carr case, and, on the strength of which inaccurate statements, learned counsel for appellee attempts to argue that the Carr case is not authority for our contention here, that Parker was engaged in interstate commerce at the time he was killed.

The rest of the response to the petition for rehearing consists of an attempt, very inaccurately, to argue the facts concerning the switching movement which was being made at the time Parker was killed, and as to most of which alleged facts learned counsel is dependent solely upon his imagination; because he concedes, or must do so, that most of his discussion and inferences are not to be found in, nor are they deducible from, anything shown by the record. As an example of this, while the only testimony in the record—uncontradicted testimony—is to the effect that the switching movement which was being made at the time Parker was killed, was for the sole purpose of getting the empty cars, which stood between the engine and the M. C. car, out of the way, so that the engine could couple to the M. C. car, loaded with interstate freight, and
249*e* attach it to a train which was to move early the next morning from Middlesborough, Kentucky, through Tennessee, into, and through a considerable part of, Virginia, it is argued in the response that it is not true that such was the immediate purpose of the switch crew, but, on the contrary, that they were merely engaged in switching empty cars, not engaged in interstate commerce. We do not think the Court will accept this testimony of opposing counsel, in lieu of the testimony in the record. Before a jury, learned counsel might prove a dangerous witness, as did Pittman, in Judge Hise's case. But before this learned Court, we do not think the testimony of opposing counsel will prevail over that contained in the record.

Nor do we think it worth while to point out that the malevolent assertion, several times repeated in varied forms, in the response, that the testimony that the crew were on their way to get the M. C.

car at the time Parker was hurt, is merely a frame-up, a manufactured defense, bunglesomely performed, finds no justification in the record, and is unjust and unworthy of its author. Opposing counsel is again testifying, and his testimony is directly in the teeth of the uncontradicted evidence in the record, and which must be accepted as true by this Court. As was said by the Court in Sinclair's Adm'r v. I. C. R. Co., 129 Ky. 828, 834.

"* * * Where a witness testified unequivocally to a fact, and there is nothing in his evidence to warrant the jury in rejecting it, and he is in no wise contradicted or impeached, the jury are not at liberty to disregard his testimony. The jury are sworn to render their verdict according to the evidence, and they are not at liberty to reject the evidence capriciously."

So it is here. The uncontradicted evidence in the record is that the crew, at the time Parker was killed, were moving the empty cars out of the way, in order that they might couple to the M. C. car and attach it to the interstate train, which was then being made up, and which was to start out on its journey early the next morning. We think the Court will accept, as it is bound to do, this evidence in the record, rather than accept opposing counsel's testimony in his response to the petition for rehearing, on this point.

294*f* The reference in the response to Parker's having been "butchered by the gross negligence of conductor Towns, and he is now trying to shield his own misconduct, and protect the railroad, and to aid the railroad in satisfying the demands of the law for the death of this young man," is both gratuitous and highly improper. It needs no further comment from us.

And, finally, it is not true, as stated in the response, that the M. C. car was not removed from the sidetrack, on which it was standing at the time Parker was killed, until sometime next morning, several hours after Parker was killed. That car, as the testimony shows, was taken from the sidetrack and incorporated into the interstate train very shortly after Parker was killed. It was the empty cars, that opposing counsel claim the crew were then switching to their destination, that were not switched, further than to move them out of the way of M. C. car, until sometime the following day, if then. At all events, those empty cars were not switched by the night crew, of which Parker was a member on the night he was killed. But the M. C. car was switched by that crew that night, soon after Parker was killed, and incorporated in the interstate train which left Middlesborough for Tennessee and Virginia points early the next morning, as shown by witness Harris, of local train 81, July 1, 1913, as explained on page six of our petition for rehearing.

294*g* For the reasons argued in our petition for rehearing, as well as for the reasons herein set forth, we earnestly insist that Parker was engaged in interstate commerce at the time he was killed; that the cause of action, if any, for his death is under the Federal Employers' Liability Act, and not otherwise; that this Court erred in holding otherwise; and that its opinion so doing should be withdrawn, and that another opinion should be delivered in lieu thereof, reversing the judgment of the Knox Circuit Court

and holding that said Court erred in not granting defendant's motion to instruct the jury peremptorily to find for it.

Respectfully submitted,

BLACK, BLACK & OWENS,
BENJAMIN D. WARFIELD,
Counsel for Appellant.

September 16, 1915.

The following is a copy of the receipt of appellee's counsel for copy of the foregoing reply:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

versus

EDWARD PARKER'S ADM'R, *Appellee.*

Appealed from the Knox Circuit Court.

Appellant's Reply to Appellee's Response to Appellant's Petition for Rehearing.

I hereby acknowledge the receipt from appellant's counsel of copy of their reply to appellee's response to appellant's petition for rehearing in the above entitled cause, this 17 Sept., 1915.

J. M. ROBSION,
Counsel for Appellee.

Afterwards at a Court of Appeals held as aforesaid the following order was entered herein, to-wit:

L. & N. R. R. Co.
vs.
PARKER'S ADM'R.

Knox.

Came the appellant and tendered and moved the court to file an additional authority on the petition for rehearing herein, which motion being heard is sustained and said additional authority is ordered filed.

The following is the paper filed by the foregoing order:

Court of Appeals of Kentucky, Fall Term, 1914.

No. 362.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus
EDWARD PARKER'S ADMINISTRATOR, Appellee.

Appeal from the Knox Circuit Court.

Additional Authority in Support of Appellant's Petition for Rehearing.

295 On November 1, 1915, the Supreme Court of the United States delivered the following opinion:

Supreme Court of the United States, October Term, 1915.

No. 564.

PENNSYLVANIA COMPANY, Plaintiff in Error,
vs.
MARION DONAT.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

(November 1, 1915.)

Memorandum Opinion by Mr. Justice McReynolds by Direction of the Court.

The question presented upon this writ of error is "so frivolous as not to need further argument," and the motion to affirm the judgment below must be granted. (Rule 6, sec. 5.)

Basing his claim upon the Employers' Liability Act of April 22, 1908 (35 St. 65), Marion Donat began the original action in the United States District Court for Indiana against the Pennsylvania Company, a carrier by railroad, to recover damages for personal injuries alleged to have been suffered by him while employed as a yard conductor. The trial court refused a request to charge that he was not engaged in interstate commerce when the accident occurred and therefore could not recover. This refusal is the sole ground upon which error is now asserted.

Two loaded coal cars coming from without the State were received in the carrier's yard at Fort Wayne, Indiana. They were destined to Olds' private switch-track connecting with the yard; and acting under instructions Donat commenced the switching movement necessary to place them thereon There was evidence tending to

show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to
296 remove two empty ones from the private track. While engaged about the removal defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. Rep. 1021) the Circuit Court of Appeals was clearly right. New York Central and Hudson River Railroad Co. v. Carr, 238 U. S. 260, 262-263.

Affirmed."

This case is so conclusive in our favor, on the proposition that Parker was engaged in interstate commerce at the time he was killed, although the engine did not have hold of the interstate commerce car at the time of the injury, that we deem it our duty to call the Court's attention to this latest utterance of the Supreme Court on this subject

The Court will observe that the Carr case, on which our petition for rehearing is rested, is cited as controlling the decision of the Court in the opinion, supra.

Respectfully submitted,

BLACK, BLACK, & OWENS,
BENJAMIN D. WARFIELD,
Counsel for Appellant.

November 8, 1915.

Afterwards at a Court of Appeals held as aforesaid on November 12, 1915, the following order was entered herein, to-wit:

L. & N. R. R. Co.
vs.
PARKER'S ADM'R.

Knox.

The court being sufficiently advised it is ordered that the petition for rehearing herein be and the same is now overruled.

Came the appellant by counsel and moved the court to
297 suspend the issual of the mandate herein 30 days, which motion is passed for notice.

Afterwards at a Court of Appeals held as aforesaid on November 18, 1915, the following order was entered herein, to-wit:

L. & N. R. R. Co.
vs.
PARKER'S ADM'R.

Knox.

Came the appellant by counsel and filed notice of the motion heretofore entered, and came the appellee and filed an objection to said

motion, and the court being sufficiently advised it is ordered that appellant be given 15 days to take steps on writ of error to the Supreme Court if desired and the mandate of this court is suspended during that time.

The following are copies of the notice, motion and objection filed by the foregoing order:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
NATHAN PARKER, Adm'r of the Personal Estate of Edward Parker, Dec'd, Appellee.

Notice.

J. M. Robsion, Attorney for appellee in the above styled action, is hereby and now notified that the above named appellant, Louisville & Nashville Railroad Company, will, during Motion hours of the Court of Appeals of Kentucky, on November 17, 1915, in the Court room of said Court in the City of Frankfort, Ky., move the Court of Appeals of Kentucky then and there in session to suspend
298 the issual of any mandate or execution in the above styled action, for thirty days next after November 17, 1915, to enable and allow said appellant to take and perform the necessary steps to prosecute, as it desires to do, a Writ of Error, from the Court of Appeals and its opinions in this action, to the Supreme Court of the United States sitting in Washington, in the District of Columbia.

This November 16, 1915.

LOUISVILLE & NASHVILLE RAILROAD CO.,
By B. D. WARFIELD.
BLACK, BLACK & OWENS,
Attorneys for said Company.

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
versus
EDWARD PARKER'S ADM'R, Appellee.

Appeal from the Knox Circuit Court.

Motion.

Appellant's petition for rehearing herein having been overruled, comes appellant, by its attorney, and moves the Court to suspend for thirty days from this date the issuing of the mandate herein, in

order to give appellant time to take the requisite steps to prosecute a writ of error from the Supreme Court of the United States to this Court to review the judgment of this Court in said cause.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By B. D. WARFIELD, *Its Attorney.*

299 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
NATHAN PARKER, Adm'r of the Estate of Edward Parker, Deceased, Appellee.

Objection to Appellant's Motion.

Comes the appellee Nathan Parker, Administrator of the estate of Edward Parker, Deceased, and objects to the motion of the appellant Louisville & Nashville Railroad Company, made before this Court on November 17th, 1915 to suspend the issual of mandate or execution in the above styled action, for thirty days, or any other time, for any purpose at all.

Wherefore appellee prays the Judgment of the Court and for all proper relief.

J. M. ROBSION,
Counsel for Appellee.

Afterwards on the 26th day of November, 1915, the appellant and plaintiff in error filed in the Clerk's office of the court of Appeals of Kentucky, its petition for a writ of error and the allowance thereof, which is in words and figures following, to-wit:

300 Original.

UNITED STATES OF AMERICA,
Commonwealth of Kentucky, ss:

To the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky:

Your petitioner, Louisville and Nashville Railroad Company, respectfully shows that on the 18th day of June, 1915, the Court of Appeals of Kentucky rendered a judgment against your petitioner in a certain cause to recover damages for the death of one of your petitioner's employees, which occurred June 30, 1913, and in which cause your petitioner was appellant, and Nathan Parker, as administrator of the estate of Edward Parker, deceased, was appellee, affirming the judgment of the Circuit Court of Knox County, Kentucky, wherein said Nathan Parker, as administrator, aforesaid, was plaintiff, and your petitioner was defendant, as will appear from

the record of the proceedings in said cause. And your petitioner further shows that subsequently, and in due time, it filed in said Court of Appeals of Kentucky its petition for a rehearing, and that on November 12, 1915, said Court overruled said petition for rehearing; and your petitioner further shows that said Court of Appeals of Kentucky is the highest court in said State in which a decision in said suit could be had; and your petitioner further shows that in said order and judgment affirming said judgment of the Knox Circuit Court, and in overruling your petitioner's petition for rehearing therein, and in the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore, said petitioner prays that a Writ of Error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of Kentucky, for the correction of the errors so complained of, and that a Transcript of the Record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Petitioner,*
By JAMES D. BLACK,
HIRAM H. OWENS,
BENJAMIN D. WARFIELD.

The Writ of Error, as prayed for in the foregoing petition, is hereby allowed, this 26th day of November, A. D., 1915, the Writ of Error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of Ten thousand Dollars, ($10,000.00).

Done at Frankfort, Kentucky, this 26th day of November, A. D., 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Filed in my office this 26th day of November, A. D., 1915.
ROBT. L. GREENE,
Clerk of the Court of Appeals of Kentucky.

301 At the same time, to-wit, November 26, 1915, said plaintiff in error filed its writ of error in said clerk's office, which is in words and figures following, to-wit:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honourable the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky before you, or some of you, being the highest court of law or equity in the said State in which a decision could be had in the said suit between the Louisville and Nashville Railroad Com-

pany, appellant, and Nathan Parker, as administrator of the estate of Edward Parker, deceased, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the Constitution, treaty, statute, or commission: a manifest error hath happened to the great damage of the said Louisville and Nashville Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

302 same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honourable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States for the Eastern District of Kentucky, at Frankfort, Kentucky, on the 26th day of November, in the year of our Lord one thousand nine hundred and fifteen.

[Seal Eastern K't'y Dist. Court, United States of America.]

JNO. W. MENZIES,
Clerk of the District Court of the United States in and for the Eastern District of Kentucky,
By CHAS. N. WIARD,
Deputy Clerk.

Allowed by
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Filed Nov. 26, 1915. Robt. L. Greene, C. C. A.

303 At the same time, to-wit, November 26, 1915, said plaintiff in error filed its writ of error bond, which is in words and figures following, to-wit:

Court of Appeals of the State of Kentucky.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant,
vs.
NATHAN PARKER, as Administrator of the Estate of Edward Parker, Deceased, Appellee.

Supersedeas Bond.

Know all men by these presents: That the Louisville and Nashville Railroad Company, as principal, and the National Surety Company, of New York, as surety, are held and firmly bound unto Nathan Parker, as administrator of the estate of Edward Parker, deceased, in the sum of ten thousand dollars, ($10,000.00), to be paid to the said obligee, and to his successors in office, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

In testimony whereof we have hereunto subscribed our names and affixed our seals this twenty-fourth day of November, A. D. 1915.

Whereas the above-named Louisville and Nashville Railroad Company hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Kentucky:

Now, Therefore, The condition of this obligation is such that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail
304 to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

[SEAL.] LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By W. L. MAPOTHER, *First Vice-President.*

Attest:
M. K. GILBERT, *Ass't Sec'y.*

NATIONAL SURETY COMPANY OF NEW YORK,
By J. MORTON MORRIS, *Its Attorney in Fact.*

STATE OF KENTUCKY,
County of Jefferson, sct:

I, G. W. B. Olmstead, a Notary Public within and for the above-named county and State, certify that on this day and in said county and State the foregoing instrument was produced to me, and was acknowledged by W. L. Mapother, First Vice-President of the above-named Louisville and Nashville Railroad Company to be its act and deed, and was also acknowledged by J. Morton Morris, attorney in

fact of the above-named National Surety Company, of New York, for and on behalf of said Surety Company to be its act and deed.

Given under my hand and official seal this 24th day of November, A. D. 1915.

My commission expires January 23, 1918.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Kentucky.

I hereby approve the foregoing bond and surety, this 26th day of November, A. D. 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

305 At the same time, to-wit, November 26, 1915, the plaintiff in error filed in said clerk's office its assignment of errors in words and figures following, to-wit:

In the Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
NATHAN PARKER, Administrator of the Estate of Edward Parker, Deceased, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Assignment of Errors.

Now comes the Plaintiff in Error, Louisville & Nashville Railroad Company, by James D. Black, Hiram H. Owens, and Benjamin D. Warfield, its attorneys, and says that in the record, proceedings, decision and final judgment of the Court of Appeals of the Commonwealth of Kentucky, in the above entitled cause, there is manifest error to the prejudice of this Plaintiff in Error in this, to-wit:

First. The said Court of Appeals of Kentucky erred in rendering judgment affirming the judgment of the Knox Circuit Court of Kentucky, for the sum of Seven Thousand ($7,000) Dollars, together with costs, interest and Ten (10) per cent; damages entered on error in favor of said Defendant in Error and against said Plaintiff in Error.

Second. The said Court of Appeals of Kentucky erred in not reversing said judgment of the said Knox Circuit Court, and in not remanding said cause to said Knox Circuit Court for a new trial.

Third. The said Court of Appeals of Kentucky erred in approving the ruling of the Knox Circuit Court that Defendant in Error's
306 decedent, Edward Parker, was engaged in intrastate commerce, and not in interstate commerce, at the time he received the injuries from which he died; and erred in refusing to hold, and to instruct the jury, that Defendant in Error's cause of action, if any, was under, and exclusively controlled and regulated by, the provisions of a certain Act of Congress of the United States,

approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad, to their Employees in Certain Cases," and commonly known as the "Employers' Liability Act."

Fourth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Knox Circuit Court in overruling Plaintiff in Error's motion, which was made immediately after the verdict was rendered, and before any judgment was rendered thereon, to render a judgment in favor of Plaintiff in Error non obstante veredicto, on the ground that the cause of action alleged in Defendant in Error's petition was not proven, and that the case proven was not alleged—the case alleged being that of fatal injury to an intrastate employee, whereas the case proven was that of fatal injury to an interstate employee.

Fifth. The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Knox Circuit Court in giving to the jury, on said court's own motion, instruction No. 3, to the giving of which instruction to the jury defendant, now Plaintiff in Error, objected and excepted at the time, and assigned error thereon in its motion and grounds for a new trial and in its bill of exceptions, constituting portions of its record and assignment of
307 errors, as the practice is, in said Court of Appeals of Kentucky. Said instruction No. 3 reads as follows:

"If your verdict is for the plaintiff, Parker's Administrator, you should find for him such a sum in damages as you may believe from the evidence will fairly and reasonably compensate the estate of Edward Parker for the destruction of his power and ability to earn money, if any, not to exceed the sum of $30,000, the amount claimed in the plaintiff's petition,"

which said instruction presented to the jury the measure of damage rule in death cases, as approved by the Court of Appeals of Kentucky, but which said instruction did not properly present to the jury the measure of damage rule required by the opinions of the Supreme Court of the United States in cases governed and controlled by said Employers' Liability Act of Congress.

Sixth. The Court of Appeals of Kentucky erred in sustaining and approving the judgment of the Knox Circuit Court awarding Defendant in Error damages in the sum of Seven Thousand ($7,000) Dollars against the Plaintiff in Error in this cause, in which there was neither averment nor proof that decedent, Edward Parker, left any beneficiary or beneficiaries who were pecuniarily dependent upon him, or to whom he had ever made pecuniary contributions, or who had reasonable expectation of receiving pecuniary contributions from him in the future, if he had lived.

Seventh. The said Court of Appeals of Kentucky erred in approving the action of the Knox Circuit Court in refusing to sustain Plaintiff in Error's motion, when first made at the close of Plaintiff in Error's evidence, or, when renewed, at the close of all the evidence, to instruct the jury peremptorily to find for Plaintiff in Error, on the ground that Defendant in Error failed to prove that his decedent

lost his life as a result of the negligence of the Plaintiff in
308 Error or its agents or servants.

Eighth. The said Court of Appeals of Kentucky erred in sustaining the action of the Knox Circuit Court in refusing to sustain Plaintiff in Error's motion for a peremptory instruction to the jury to find in its favor, on the ground that Defendant in Error's decedent was engaged in interstate commerce at the time he was fatally injured, and that the cause of action, if any, for such death was exclusively under the said Federal Employers' Liability Act, under which Defendant in Error did not seek a recovery, nor allege or prove that decedent's next of kin had a pecuniary interest in his life, or had lost pecuniary benefits by reason of his death.

For the foregoing prejudicial errors, and each of them, affecting the merits of this cause, the Plaintiff in Error prays a reversal of the judgment of the said Knox Circuit Court of Kentucky, and of the judgment of affirmance thereof by the said Court of Appeals of Kentucky.

And the said Louisville & Nashville Railroad Company, as Plaintiff in Error, prays that the judgment aforesaid, for each of the errors aforesaid, whereby Plaintiff in Error has been deprived of its rights, privileges and immunities, be reversed, annulled and held for naught.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By JAMES D. BLACK,
HIRAM H. OWENS,
BENJAMIN D. WARFIELD,
Its Attorneys.

309 At the same time, to-wit, November 26, 1915, said plaintiff in error filed in said clerk's office its præcipe, which is in words and figures following, to-wit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
NATHAN PARKER, Administrator of the Estate of Edward Parker, Deceased, Appellee.

Præcipe of Said Appellant, Now Plaintiff in Error.

In conformity with rule 8 of the Supreme Court of the United States, and in order to the preparation of the transcript of record upon the writ of error from said Supreme Court to the Court of Appeals of Kentucky, the above named, the Louisville and Nashville Railroad Company, Appellant in said Court of Appeals, indicates the following as the portions of the record in this section to be incorporated into the transcript of record on said writ of error, to-wit:

1. The preamble, on page ½.
2. The petition, on pages 2, 3 and 4, inclusive; and the order filing same, on page 5.
3. Order showing defendant's motion to require the plaintiff to make his petition more specific and definite, on page 6.
4. And said motion, on pages 7 and 8.
5. The order overruling said motion, on page 9.
6. The order filing defendant's answer, on page 10.
7. Defendant's answer, on pages 10, 11, 12 and 13.
8. The order filing said answer, on page 14.
9. Defendant's amended answer, on pages 20 and 21; and the order filing same, on page 20.

310 10. The order showing plaintiff's offer to file an amended petition, on page 23; and said amended petition, on pages 23, 24, 25 and 26.

11. Order overruling plaintiff's motion to file said amended petition, on page 33.
12. Order showing that by agreement of parties all of the affirmative matter contained in the second paragraph of defendant's answer is controverted of record, on page 34.
13. Order showing impaneling of jury and beginning of trial, on page 34.
14. Order showing the defendant tendered and offered to file a second amended answer, on page 36; and said second amended answer, on pages 35 and 36.
15. Order overruling defendant's motion to file said second amended answer, on page 37.
16. Order showing defendant's motion for judgment in its favor, notwithstanding the verdict of the jury for the plaintiff, on page 37; and order overruling said motion, on the same page.
17. The judgment, on page 38.
18. Order filing defendant's motion and grounds for a new trial; and order overruling same and granting appeal to Court of Appeals, on page 38¼.
19. Order directing official stenographer to transcribe the evidence, and extending the time to defendant to prepare and tender its bill of exceptions and transcript of evidence, on pages 38 1-5 and 38¾.

311 20. Order showing defendant's tender of its bill of exceptions and transcript, and asking that they be approved; and showing that the court took time thereon, on page 39.

21. Order approving transcript of evidence and bill of exceptions, on page 40.
22. Defendant's motion and grounds for a new trial, on pages 41 to 46, inclusive.
23. Defendant's bill of exceptions, on pages 47 to 62, inclusive.
24. Clerk's certificate, on page 63.
25. Supersedeas bond, on pages 64 and 65.
26. All of the stenographer's transcript of evidence marked for identification "X", and the exhibits referred to therein and made part thereof.

27. The judgment of affirmance and the opinion of the Court of Appeals of Kentucky, June 18, 1915 (165 Kentucky Reporter 658.)

28. Appellant's petition for rehearing, filed July 12, 1915; appellee's response thereto, filed September 20, 1915; appellant's reply to said response, filed September 20, 1915; and additional authority filed by appellant November 9, 1915; order overruling appellant's petition for rehearing, filed November 12, 1915; appellant's motion, made the same date, to suspend issual of mandate 30 days, to enable appellant to take steps to prosecute a writ of error from the Supreme Court of the United States; and order of November 18, 1915, granting appellant 15 days' time for said purpose.

The mandate of the Court of Appeals dated —— —, —, entering final judgment in conformity with the opinion of
312 June 18, 1915, (165 Kentucky Reporter 658). The petition for writ of error; the writ of error and allowance of same; the assignment of errors; the writ of error bond; the citation and return of service of same; and this præcipe and the return of service of same.

This November 22nd, 1915.

Copy of the foregoing præcipe received, this the 23d day of November, A. D., 1915, and service accepted.

BLACK, BLACK & OWENS,
BENJAMIN D. WARFIELD,
Counsel for the Above-named Appellant and Plaintiff in Error.

J. M. ROBSION,
Attorney for Nathan Parker, as Administrator of the Estate of Edward Parker, Deceased.

At the same time, to-wit, November 26, 1915, the defendant in error filed his præcipe, which is in words and figures following, to-wit:—

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
NATHAN PARKER, Administrator of the Estate of Edward Parker, Deceased, Appellee.

Præcipe of Said Appellee, Now Defendant in Error.

Counsel for Nathan Parker, Administrator of the Estate of Edward Parker, Deceased, having been served with notice on the 23rd day of November 1915, as to the parts of the record of the Plaintiff in Error, Louisville & Nashville Railroad Company, proposes to use in order to the preparation of the transcript of the record
313 upon the writ of error, from said Supreme Court, to the Court of Appeals of Kentucky, in the above styled action, now comes Nathan Parker, Administrator of the Estate of Edward Parker Deceased, and notifies the said Plaintiff in error that the de-

fendant in error requires the plaintiff in error to copy all of the record in the above entitled action, except briefs in order for the preparation of the transcript of the record upon the writ of error from the Supreme to the Court of Appeals of Kentucky, in the above entitled action. This November 23rd, 1915.

J. M. ROBSION,
Counsel for Defendant in Error.

Service of Notice accepted. This November 23rd, 1915.
BLACK, BLACK & OWENS,
Attorney- for Plaintiff in Error.

314 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

In obedience to the commands of the Writ of Error which is embodied in and attached to the record I hereby transmit to the Supreme Court of the United States a complete transcript of the record in the case of Louisville & Nashville Railroad Company, Appellant and Plaintiff in Error, vs. Edward Parker's Administrator, Appellee and Defendant in Error, on appeal to this court from the Knox Circuit Court, and as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at Frankfort, Kentucky, this 16th day of December, A. D. 1915.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk of the Kentucky Court of Appeals.

Fee for this transcript $79.50.

315 UNITED STATES OF AMERICA, *ss:*

In the Court of Appeals of the Commonwealth of Kentucky.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
vs.
NATHAN PARKER, as Administrator of the Estate of Edward Parker, Deceased, Defendant in Error.

You, Nathan Parker, as administrator aforesaid, are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error issued out of this court and filed in the office of the Clerk of the Court of Appeals of Kentucky, wherein said Louisville and Nashville Railroad Company is plaintiff in error, and the said Nathan Parker, as administrator of the estate of Edward Parker, deceased, is defendant in error, to show

cause, if any there be, why the judgment rendered against the said Louisville and Nashville Railroad Company, plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honourable Shackelford Miller, Chief Justice of the Court of Appeals of the Commonwealth of Kentucky, this 26th day of November, in the year of our Lord one thousand nine hundred and fifteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
ROBT. L. GREENE,
Clerk Court of Appeals of Kentucky.

Copy of the above citation received and service accepted this 29th day of November, 1915.

J. M. ROBSION,
Counsel for Defendant in Error.

Filed Nov. 26, 1915. Robt. L. Greene, C. C. A.

Endorsed on cover: File No. 25,062. Kentucky Court of Appeals. Term No. 779. Louisville & Nashville Railroad Company, plaintiff in error, vs. Nathan Parker, as administrator of the estate of Edward Parker, deceased. Filed December 24th, 1915. File No. 25,062.

FILED
JUL 20 1916
JAMES D. MAHE
CL

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916, No. 330.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

NATHAN PARKER, As Administrator of the Estate of Edward Parker, Deceased, - - - - - - Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

PAGE

Introduction 1

Statement 1

Assignment of Errors 4

Argument 6

The errors assigned and argued involve the ultimate question for decision as to whether decedent was engaged in interstate commerce or intrastate commerce at the time he was hurt. The State courts held that he was engaged in intrastate commerce; whereas it is argued for defendant that decedent was then engaged in interstate commerce, and that the Kentucky courts erred in holding otherwise.

TABLE OF CASES AND AUTHORITIES CITED, ARRANGED IN ALPHABETICAL ORDER.

PAGES

American R. Co. v. Didricksen, 227 U. S. 145..... 36

C. & O. R'y Co. v. Kelly, Admx., 241 U. S. —..... 37

Id. v. Gainey, etc., *Ib.* —..... 37

Garrett, Admr., v. L. & N. R. Co., 235 U. S. 308.... 36

Great Northern R'y Co. v. Otos, 239 U. S. 349.....26, 34

G. C. & S. F. R. Co. v. McGinnis, 228 U. S. 173..... 36

Illinois Central R. Co. v. Behrens, 233 U. S. 473.. 30

Lamphere v. Oregon R. & N. Co., *et al.*, 196 Fed. 336 .....26, 27

L. & N. R. Co. v. Stewart, Admx., 241 U. S. 261.... 37

Michigan Central R. Co. v. Vreeland, 227 U. S. 59.. 36

N. Y. C. & H. R. R. Co. v. Carr, 238 U. S. 260.....26, 31

North Carolina R. Co. v. Zachary, etc., 232 U. S. 248, 260 .....26, 30, 36

Pecos & Northern Texas R'y Co v. Rosenbloom, 240 U. S. 439.....26, 34

Pedersen v. D., L. & W. R'y Co., 229 U. S. 146..... 26

Pennsylvania R. Co. v. Donat, 239 U. S. 50.....26, 33

St. L. & S. F. R'y Co. v. Seale, 229 U. S. 156, 161... 3, 28

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916, No. 330.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Plaintiff in Error,*

versus

NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED, - - - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

In this brief we will refer to the Louisville & Nashville Railroad Company, plaintiff in error, as defendant; to Nathan Parker, administrator, as plaintiff, and to his intestate, Edward Parker, as decedent. The italics used are ours.

STATEMENT.

About 10 o'clock on the evening of June 30, 1913, decedent, while employed as fireman on one of defendant's switch engines in its yards at Middlesboro, Ky., was

fatally injured by coming in contact with a freight caboose which was then standing on track No. 11, but close enough to track No. 10, on which the switch engine was shoving an empty car, as that decedent came in contact with the caboose while leaning out of the window on his side of the engine as it moved back on track No. 10. The purpose of moving the empty car was to get it out of the way so that the engine could get to, and incorporate into an interstate train, a loaded freight car then moving in interstate commerce from Knoxville, Tenn., into and through a portion of Kentucky, thence back into Tennessee, and thence into Virginia, to stations in the last two of which all the freight in the car was destined.

Plaintiff instituted this action against defendant in the Circuit Court of Knox County, Ky., and recovered a verdict and judgment for seven thousand dollars ($7,000), which was affirmed by the Court of Appeals of Kentucky; whereupon defendant sued out a writ of error from this court directed to the Court of Appeals of Kentucky to review its judgment affirming the judgment of the Knox Circuit Court (165 Ky. 658).

All of the questions raised by defendant's assignment of errors which we shall argue are resolvable into the single proposition as to whether or not decedent was engaged in interstate commerce at the time he received the fatal hurt. Both the Knox Circuit Court and the Court of Appeals of Kentucky held that decedent was not so engaged, but that he was then engaged in intrastate commerce. Our argument is that there was error in so holding, and that decedent was injured while engaged in

interstate commerce. If he was, neither the pleadings nor the evidence authorized a recovery of any damages whatsoever against defendant. The Court of Appeals of Kentucky so held. In its opinion, in discussing the argument made by defendant in that court, that the trial court erred in not sustaining defendant's motion to require plaintiff to make his petition more definite and certain and to set forth in terms whether he was proceeding under the State law or under the Federal Employers' Liability Act (St. L. & S. F. R'y Co. v. Seale, 229 U. S. 156, 161), the court said (printed record, p. 149):

"* * * The court properly overruled this motion, for the plaintiff's petition upon its face clearly indicated that he was proceeding under the State law, and upon the assumption that the intestate was at the time of his death engaged in intrastate commerce. That this action of the court was not prejudicial to appellant is apparent when it is considered that if at the conclusion of the testimony it had developed that Parker at the time of his injury was engaged in interstate commerce there could have been no recovery, and appellant would have been entitled to the peremptory instruction for which it asked. "*The controlling question in this case is whether or not at the time of his injury Parker was engaged in interstate commerce, for if he was, it is conceded by the attorney for the appellee that there can be no recovery.* This question must be determined from the testimony of the yard foreman or conductor who had charge of the movement of all cars in the yard and one other witness, a brakeman, who testifies as to the destination of the car which was attached to the engine at the time of the injury."

ASSIGNMENT OF ERRORS.

The following are defendant's Assignment of Errors (printed record, pp. 178-180):

"First: The said Court of Appeals of Kentucky erred in rendering judgment affirming the judgment of the Knox Circuit Court of Kentucky, for the sum of seven thousand ($7,000) dollars, together with costs, interest and ten (10) per cent damages entered on error in favor of said defendant in error and against said plaintiff in error.

"Second: The said Court of Appeals of Kentucky erred in not reversing said judgment of the said Knox Circuit Court, and in not remanding said cause to said Knox Circuit Court for a new trial.

"Third: The said Court of Appeals of Kentucky erred in approving the ruling of the Knox Circuit Court that defendant in error's decedent, Edward Parker, was engaged in intrastate commerce, and not in interstate commerce, at the time he received the injuries from which he died; and erred in refusing to hold, and to instruct the jury, that defendant in error's cause of action, if any, was under, and exclusively controlled and regulated by, the provisions of a certain Act of Congress of the United States, approved April 22, 1908, entitled, 'An Act Relating to the Liability of Common Carriers by Railroad, to their Employes in Certain Cases,' and commonly known as the 'Employers' Liability Act.'

"Fourth: The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Knox Circuit Court in overruling plaintiff in error's motion, which was made immediately after the verdict was rendered, and before any judgment was rendered thereon, to render a judgment in favor of plaintiff in error *non obstante veredicto*, on the ground that the cause of action alleged in defendant in error's petition was not proven, and that the case proven was not alleged—the case al-

leged being that of fatal injury to an intrastate employe, whereas the case proven was that of fatal injury to an interstate employe.

"Fifth: The said Court of Appeals of Kentucky erred in sustaining and approving the action of the Knox Circuit Court in giving to the jury, on said court's own motion, Instruction No. 3, to the giving of which instruction to the jury defendant, now plaintiff in error, objected and excepted at the time, and assigned error thereon in its motion and grounds for a new trial and in its bill of exceptions, constituting portions of its record and assignment of errors, as the practice is, in said Court of Appeals of Kentucky. Said Instruction No. 3 reads as follows:

"'If your verdict is for the plaintiff, Parker's administrator, you should find for him such a sum in damages as you may believe from the evidence will fairly and reasonably compensate the estate of Edward Parker for the destruction of his power and ability to earn money, if any, not to exceed the sum of $30,000, the amount claimed in the plaintiff's petition,' which said instruction presented to the jury the measure of damage rule in death cases, as approved by the Court of Appeals of Kentucky, but which said instruction did not properly present to the jury the measure of damage rule required by the opinions of the Supreme Court of the United States in cases governed and controlled by said Employers' Liability Act of Congress.

"Sixth: The Court of Appeals of Kentucky erred in sustaining and approving the judgment of the Knox Circuit Court awarding defendant in error damages in the sum of seven thousand ($7,000) dollars against the plaintiff in error in this cause, in which there was neither averment nor proof that decedent, Edward Parker, left any beneficiary or beneficiaries who were pecuniarily dependent upon him, or to whom he had ever made pecuniary contributions, or who had reasonable expectation of receiving pecuniary contributions from him in the future, if he had lived.

"Seventh: The said Court of Appeals of Kentucky erred in approving the action of the Knox Circuit Court in refusing to sustain plaintiff in error's motion, when first made at the close of plaintiff in error's evidence, or, when renewed, at the close of all the evidence, to instruct the jury peremptorily to find for plaintiff in error, on the ground that defendant in error failed to prove that his decedent lost his life as a result of the negligence of the plaintiff in error or its agents or servants.

"Eighth: The said Court of Appeals of Kentucky erred in sustaining the action of the Knox Circuit Court in refusing to sustain plaintiff in error's motion for a peremptory instruction to the jury to find in its favor, on the ground that defendant in error's decedent was engaged in interstate commerce at the time he was fatally injured, and that the cause of action, if any, for such death was exclusively under the said Federal Employers' Liability Act, under which defendant in error did not seek a recovery nor allege or prove that decedent's next of kin had a pecuniary interest in his life, or had lost pecuniary benefits by reason of his death."

ARGUMENT.

Inasmuch as all of the errors thus assigned, which we shall argue, involve the ultimate question for decision as to whether decedent was engaged in interstate or intrastate commerce at the time he was hurt, we will argue the assignments together on this proposition. Then, we will briefly discuss separately some of the branches of the main question.

There are eleven tracks or switches in defendant's yards at Middlesboro, Ky., numbered from 1 to 11, inclusive. Track No. 11 is known as the "lead track," from and into which all of the other ten tracks or switches

lead. On the night of the injury, and sometime before, the switching crew, of which decedent was fireman, made up local freight train No. 86 which was to be run the following day from Middlesboro to Corbin, Ky., and left the train standing on track No. 11, preparatory to being moved to its destination the next morning. A caboose was attached to the rear of this train and was left standing on track No. 11, near to where it intersects with track No. 10. And it was the caboose of No. 86 with which decedent came in contact as his engine was moving from track No. 9 to track No. 10. At that time the switch engine had hold of an empty car, which was moved the following day to the establishment of a Mr. Hoe, who conducted a business at Middlesboro. And it was held by the Kentucky courts that the fact that this empty car was not then moving in interstate commerce is the controlling factor in the case, and thereby constituted decedent an employe in intrastate commerce at the time he was injured. Whereas, our contention is that the switch engine at the time was going after M. C. car 13908 to incorporate it in train No. 89, which the switching crew of which decedent was a member were then making up, and which train, early the next morning, was to be moved and was moved in interstate commerce from Middlesboro, Ky., through a portion of Tennessee into the State of Virginia, and thence to Norton, in that State. It was not disputed by plaintiff in the Kentucky courts, and will not be disputed here, that car M. C. 13908 was then loaded with interstate commerce,—with merchandise which was placed in the car at Knoxville, Tenn.,

and all of which was destined to points in Virginia, and to Shawanee, Tenn. The car was loaded at Knoxville, Tenn., on the night of June 28, 1913, and was moved thence over defendant's line from Knoxville, Tenn., to Corbin, Ky., where defendant's Knoxville Division is joined by its Cumberland Valley Division, the latter running from Corbin, Ky., to Norton, Va., through portions of those two States and Tennessee. From Corbin, Ky., the car was moved in a local freight train to Middlesboro, Ky., the terminus of that train. This car reached Middlesboro on train No. 85 at 4:40 A. M., June 29, 1913, and left there for Norton and way points in train 89 early in the morning of July 1, 1913. Decedent was injured about 10 o'clock in the evening of June 30, 1913, while his engine was going after said M. C. car, standing on track No. 10 behind other empty cars that were standing on the same track, and in order that decedent's engine might incorporate said M. C. car into train No. 89, and which was actually done by the switching crew that night, shortly after decedent was injured. And the car did leave Middlesboro in train No. 89 early the next morning for Norton, Va., and delivered the freight that was loaded in the car at Knoxville, Tenn., on June 28th, at various stations between Middlesboro, Ky., and Norton, Va., including Shawanee, Tenn., where the car seals were broken for the first time since the car was sealed at Knoxville, Wheeler, Va., Emory, Va., Hagan, Va., Benhur, Va., Pennington, Va., and Big Stone Gap, Va.

In order to get at the M. C. car to switch it on to train No. 89, it was necessary for the switch engine to move out of the way not only the empty car which was placed at Hoe's the next day, but also some twelve or fifteen other empty cars which stood on track No. 10 between the M. C. car and the "lead" track No. 11. And it was while making one of the movements of the engine incident to getting the empty cars out of the way so that the switch engine could couple to the M. C. car and incorporate it in train No. 89, that decedent was injured. It is plaintiff's contention, which the Kentucky courts accepted, that the test of the character of commerce in which decedent was engaged when hurt is to be determined solely by reference to the destination of the single empty car which was coupled to the engine at the time the hurt was received, and that inasmuch as such car was an empty car destined to a private siding in Middlesboro, this fact impressed an intrastate character upon the commerce in which decedent was then engaged. Whereas, it is defendant's contention that the accidental or fortuitous circumstance that the engine had hold of an empty car, the ultimate destination of which was a private siding in Middlesboro, to which it was not moved until long after the M. C. car was incorporated into train No. 89, and had probably already re-entered upon its interstate journey, is wholly irrelevant and immaterial; as is, also, the fact that before the switch engine could move the M. C. car, the engine had also to switch other empty cars which intervened between the M. C. car and the "lead track" No. 11, to which it was necessary for

the engine to move the M. C. car in order to incorporate it into train No. 89; for the reason that none of those empty cars was then being moved to its destination, but they were merely being shunted about in the switch yard, in order that the engine could get to and move the M. C. car. The empty car destined to Hoe's siding, which the engine had hold of at the time of the accident, was not moved to the siding until the following morning; whereas, the M. C. car was incorporated into train No. 89 the night of the accident, and shortly after it had happened, and was on its way to its destination in Virginia in train No. 89 by or about the time that the empty car was moved from the switch yard to Hoe's siding the following morning. And the other empty cars which it was necessary for the engine to move in order to get at the M. C. car, were not moved to their destinations by the switch crew of which decedent was a member at all. And there is nothing in the record to show when and where they were moved.

Having thus outlined the facts shown by the evidence, we will now, for the convenience of the court, quote verbatim those portions of the testimony contained in the record, which shed any light on the question as to what work the switch engine was engaged in doing when decedent was hurt.

The opinion of the Court of Appeals of Kentucky (printed record, pp. 149, *et seq.*) quotes verbatim a considerable part of the testimony in the record as affecting the question above stated. But, as pointed out in defendant's petition for rehearing (printed record, pp.

155, *et seq.*), the opinion did not quote all of the applicable evidence in the record. For that reason, in setting out the evidence we will quote it from the transcript of evidence made a part of the record and show the pages of the printed record at which the testimony may be found.

Testimony of Peter Scalf, a witness for plaintiff, on recross-examination (R., 46):

"Q. That portion of the road from Middlesboro to Corbin is part of the Cumberland Valley Division? A. Yes, sir.

Q. And that same division extended beyond Middlesboro into the State of Virginia? A. Yes, sir.

Q. And freight train cabooses and freight trains themselves go over that entire division from Norton to Corbin and from Corbin to Norton? A. That is my understanding always."

Switchman George Tobias testified:

"Q. There was just one box car and it was next to the engine? A. Yes, sir (R., 62). * * *

Q. What were you going to do with the car you were putting in No. 10? A. I think it was going to Mr. Hoe.

Q. Who is Mr. Hoe? A. He runs a business.

Q. It was being put there in Middlesboro? A. Yes, sir (R., 66, 67). * * *"

On cross-examination, Tobias testified (R., 74):

"* * * Q. I believe Mr. Robsion asked you in detail about placing cars on track No. 9. Tell the jury what you had done after the engine had gone out of track No. 9? A. We backed in No. 10 with the head car. That one car.

Q. If I understand you, you run down far enough to clear the switch on track No. 10, and then you moved

back into track No. 10 when Parker was hurt? A. Yes, sir. * * *"

W. R. Town, yard foreman, and conductor of the switch crew of which decedent was a member, testified that the Cumberland Valley Division of defendant's railroad extends from Corbin (Ky.) to Norton (Va.); also into Tennessee. Town testified that he knew what work he was required to do the night of the injury from switch lists which he received from defendant's agent at Middlesboro, and which lists witness had before him in testifying. Then this occurs (R., 114, 115):

"Q. What work did you and the yard crew have to do and were you preparing to do at the time Parker was injured? A. We were down, going in No. 10 to get out a merchandise car for 89, a full car for No. 4 track and an empty box car for No. 5, and also had hold of the box car I was taking off there with me that was to the Furnace Mills.

Q. A merchandise car for 89, what is that? A. A southbound local freight train that leaves Middlesboro in the morning.

Q. Where does it go? A. Middlesboro to Norton, Va. (At this point the defendant offers some records.) * * *

Q. Refer to your records if you have them, and tell the jury the exact number and name of the car for which you were going and when was it to be placed in train 98? (Here witness looks at the records.) A. M. C. 13908.

Q. Do you know of your own personal knowledge as to what that car had in it? A. Had various articles; shipments of everything in it for points on the south end of the C. V. Division; at least that was my remembrance; it was a merchandise car.

Q. Did you see the waybills? A. No, sir, I did not handle the waybills.

Q. Of course you did not open the car. A. No, sir.

Q. Do you know it was a merchandise car for some point in Tennessee or Virginia? A. Tennessee or Virginia.

Q. Where was that car that contained that merchandise destined for points in Virginia or Tennessee? A. It was down some 12 or 15 car lengths down on track No. 10.

Q. The same crew with which your engine was moving, on the same track on which your engine was moving at the time Parker was injured? A. Yes, sir.

Q. Tell the jury whether or not it was or was not part of the duties of the yard crew of which Parker was a member, to take and place this car containing this merchandise for Virginia and Tennessee on train 89 destined for these points? A. Yes, sir.

Q. Do you know from the billing or from your personal knowledge where this car had come from or in what train it came to Middlesboro? A. It came to Middlesboro in train 89 (85) the night previous to my handling.

Q. Between what points did train 85 run? A. From Corbin, Ky., to Middlesboro, Ky.

Q. Where was 'M.C. 13908' placed, in what train? A. Train 89.

Q. If I understand you, you went into track No. 10, and intended to move this car for train 89 at the time Mr. Parker was injured? A. Yes, sir.

Q. Tell the jury whether or not this car did go into train 89 that run between Middlesboro and Norton, Va.? A. Yes, sir; I placed the car in train 89, whether it departed from Middlesboro on that date, I can not say.

Q. Tell the jury whether or not taking this car from track 10 and placing it in train 89 was a part of the work assigned to you and the yard crew of which Parker was a member on the night on which Parker was injured? A. Yes, sir.

Q. Tell the jury whether or not that car was on the original switch list which you received at or prior to the time you and the other members of the crew went on duty that night? A. Yes, sir.

Q. At what times did you receive the orders for the switching or work that was to be done on the various nights? A. Varied times; anywhere from 5 to 6 o'clock in the evening.

Q. On the day that shipping (switching) was to be done that night? A. Yes, sir.

Q. And at what times did you receive the switch instructions on the night Parker was killed? A. Somewhere between 5 and 6 o'clock that evening."

On cross-examination, Town testified (R., 116, 117):

"* * * Q. At the time Parker was killed the engine was backing into 10 approaching a box car? A. Yes, sir.

Q. What box car was that? A. It was an L. & N. empty going to J. R. Hoe, I believe it was consigned.

Q. That a place in Middlesboro? A. Yes, sir.

Q. In this State? A. Yes, sir.

Q. And where was this train going that was in 11, No. 86 train and caboose? A. It was to go to Corbin the next morning.

Q. Middlesboro is a freight division point, is it? A. It is a subdivision for locals.

Q. Local freights run between Middlesboro and Corbin, Ky.? A. Yes, sir.

Q. Freight locals that run from Middlesboro to Norton, Va.? A. Yes, sir.

Q. And those two local divisions make up the C. V. Division? A. Yes, sir; Middlesboro is a subdivision.

Q. I notice this car you say 13908 M. C. on your card that you have introduced here, which you say was the instructions given you that night, and under another division of the card it reads, under the head of the division of destination, it reads: '89'? A. Yes, sir.

Q. What does that mean? A. That car goes on 89.

Q. So far as your crew was concerned and so far as Parker was concerned, if that was to be moved at all, it was to be moved from No. 10 to 89 train? A. Yes, sir.

Q. And that was its destination so far as your crew was concerned? A. Yes, sir.

Q. But that car was not moved that night before Parker was killed? I mean car 13908, M. C. '89,' it was not moved that night before Parker was killed? A. No, sir.

Q. So what you are talking about this car 13908 M. C. destination 89, tonnage 10, that was a car you moved after Parker was killed and put it into 89 train? A. Yes, sir.

Q. This car that was attached to the engine, where did you put it after Parker was killed? A. I taken it along up in the morning after some time between that time and time I was quitting next morning, taken it over to the furnace.

Q. That is in Middlesboro? A. Yes, sir.

Q. And near these yards? A. Yes, sir.

Q. How many cars were between it and the car you were moving for the local trade, there at Middlesboro, and this car 13908 M. C. 89? A. 12 or 15; might have been that many, I do not know the exact number.

Q. Did you have the number of any of the freight cars in No. 10? A. I can take that list and give you the number of three.

Q. I want the number of these 12 or 15? A. I can not give them to you.

Q. Why can you not? A. It is not on the switch list.

Q. And they were not to be moved at all? A. Not by me; no, sir.

Q. How were you to go about getting that freight car? A. I was to couple to them and move that out and *they went back in No. 10 and staid.*

Q. Where was this other track you spoke about, this furnace main? A. Over by the furnace.

Q. How did you get it from No. 10? A. Went over on the track.

Q. I understand that, but what track did you go on? A. Go up the main lead and come back in around from the pit track and come up the furnace main.

Q. Did you do any switching just before you went into 10? A. Yes, sir; we switched a number of cars.

Q. Did you put any in 9? A. Yes, sir.

Q. What car did you move just before this man was killed? A. Shifted a car in No. 9; that is about the last move I remember. * * *

(R., 118): Q. Who gave you instructions to have these cars in No. 11 and attach a caboose to it and make up train 89? A. I received these instructions the same time I received those others; got them from the agent.

Q. Where are those instructions? A. Here lies a bill of them, part of them. I do not know whether it is all or not.

Q. From whom did you get instructions to put this car in 10? A. From the same place I got all the rest.

Q. Who is that? A. Bailey, at Agent's office at Middlesboro. * * *

(R., 119): Q. You did not know that car was being put in No. 10? A. Certainly I did, or I am satisfied it would not have been put in there.

Q. Did you order it put in there? A. I ordered them to go in No. 10 and bring out a cut of cars.

Q. Who did you tell that to? A. To the colored brakemen.

Q. Who? A. John Smith and George Tobias. * * *

(R., 125, 126): Q. If this car was 13908 M. C. that you say that was being put in local 89, and which might have gone to some other State, would Parker under his duties had anything to do with moving that car out of the State after it was put in train 89? A. No, sir; I do not suppose he would.

Q. Why do you have other destinations of cars in your instructions and under 89? A. That is merely a form that the company makes for the employes' convenience and wherever the destination of the cars is that goes to, you are supposed to put it in there. * * *

Q. Did your crew have any duty or right to move that car on the 89 further than on the tracks in Middlesboro? A. No, sir; not unless we received instructions. * * *

(R., 127): Q. I will ask you to refer to the card about which you have been testifying, on which is given the destination of 'M. C. No. 13908,' which you say you were going to place into train 89, which was a train bound for points in Virginia and Tennessee, and have it made a part of your evidence, and mark it 'W. R. T. No. 1.'? (At this point said card is introduced and made a part of this record, which is in words and figures as follows:) (The switching card referred to will be found on page 128 of the printed record.)

(R., 128, 129): Q. Tell the jury whether or not there were other cars which it was the duty of the yard crew to handle destined for train 89? A. I see by this report there is a car or empty box car to train 89; and here is, on the same list I find two more empties to 89, and a car of coal to 89 to weigh off of No. 7; that is all the contents of which I have.

Q. If I understand you at the time you were moving into track 10 you had an empty box car attached to your engine merely because it was in your line of employment (movement)? A. Yes, sir.

Q. And you sometime during the next morning placed that empty box car at some industrial track in Middlesboro? A. Yes, sir.

Q. *If I understand you, there were more cars between 'M. C. No. 13908,' and they were probably dead cars; that is to say, cars for which you had no destination, just standing in the yard? A. Yes, sir.*

Q. *And I believe you say, of course, it was necessary to hook to them and first move them before you could reach or get car 'M. C. No. 13908' for train 89? A. Yes, sir.*

Q. *These cars were merely standing on the track between your engine and 'M. C. No. 13908' if I understand you? A. Yes, sir.*

Q. Tell the jury whether or not the persons who controlled the engine and equipments that moved train 89 from Middlesboro to points in Virginia and Tennessee had anything at all to do with making up the train and taking this car from the siding and placing it into that

train, or whether that was the duty of the yard crew of which Parker was a member? A. It was the duty of the yard crew to make up that train.

Q. The crew in charge of train 89 after the train had been made up simply picked up the train and moved it out after it was made up by your yard crew? A. Yes, sir. • • •

(R., 130): Q. If Parker had anything to do with these three empties and loaded car you have been asked about, he would not have had anything to do with taking them into another State? A. No, sir; only got them on 89.

Q. That would have been the destination so far as your crew is concerned? A. Yes, sir.

Q. He would have been still in Middlesboro in this State? A. Yes, sir."

S. H. Adams testified that he was bill clerk for defendant at Knoxville, Tenn., and as such made up the waybilling for and had the merchandise placed in M. C. car No. 13908, June 28, 1913. The witness identified the billing which is made a part of the record, at page 130, and which, as the court will see, and as the witness testified, shows that M. C. car 13908 contained merchandise shipped from Knoxville, Tenn., to Big Stone Gap, Va., Appalachia, Va., and Mendota, Va. Then this occurs (R., 131, 132):

"Q. Do you know of your own personal knowledge in what direction a car loaded at Knoxville, destined for points shown on this bill will travel? A. They go from Knoxville to Corbin and from Corbin to Middlesboro.

Q. And then from Middlesboro? A. To stations beyond Middlesboro.

Q. What line of railroad does shipments in this territory move on, between these points? A. L. & N.

Q. Give us the date of that again? A. 6/28/1913.

Q. What do you mean? A. June 28, 1913.

Q. I believe you say these are the originals which you yourself made? A. Yes, sir.

Q. Were there other articles placed in that car at Knoxville, Tenn., besides those shown on these two bills? A. Yes, sir.

Q. Have you waybills for any other articles than these? A. The original?

Q. Yes. A. No, sir.

Q. Have you records or copies of the original, which you made of the other articles contained in that car? A. I have.

Q. To what points were the other articles therein contained destined? A. To points beyond Middlesboro —Shawanee, Tenn.

Q. That point in Tennessee can be reached only by a train moving from Knoxville, Tenn., to Corbin, Ky., and from Corbin, Ky., through Middlesboro, through Big Stone Gap, Va.? A. Yes, sir.

Q. And there were some articles other than those which you have mentioned? A. Yes, sir.

Q. And all destined beyond Cumberland Gap into Tennessee and Virginia? (Plaintiff objects; sustained; defendant excepts.)

Q. To what points were they destined? A. To points beyond Middlesboro; Shawanee, Tenn., was the first point; next Wheeler, Va.; next Rose Hill, Va., and then points between there and Dorchester Junction, Va."

On cross-examination Adams testified that none of the merchandise in the car was destined to points in Kentucky about which he was asked. And on redirect examination this occurs (R., 133):

"Q. Tell the jury whether or not merchandise loaded at Knoxville, that is, destined to points beyond Cumberland Gap, are placed on the same car with merchandise that is destined to Middlesboro, Corbin, Barbourville, or whether in separate cars? A. They are loaded into separate cars."

T. B. Colson testified that he was conductor of train 85 from Corbin to Middlesboro, June 29, which carried the M. C. car 13908 to Middlesboro, leaving Corbin at 12:40 a. m. and arriving at Middlesboro at 4:40 a. m., June 29th. The car was billed from Knoxville, and the seal was not broken while it moved from Corbin to Middlesboro. There was no freight in the car for points between Corbin and Middlesboro. Defendant's road runs from Knoxville to Corbin, and from Corbin to Norton, Va., and hauls freight and passengers between those points, and did so in June and July, 1913.

H. E. Harris testified that he was the conductor of train No. 89, July 1, 1913, from Middlesboro to Norton, Va., in making which trip the train passed through parts of the States of Kentucky, Tennessee and Virginia. Then this occurs (R., 136-139):

"Q. Tell the jury whether or not, without asking you as to other cars, you carried in that train a car M. C. No. 13908 from Middlesboro to any point? A. Yes, sir; I handled it from Middlesboro to Appalachia on July 1st, train 89.

Q. From Middlesboro to Appalachia? A. Appalachia, 10 miles this side of Norton.

Q. In what State? A. Virginia.

Q. Through what States or parts of States did you run in handling that car from Middlesboro to Appalachia on July 1, 1913? A. Out of Kentucky into Tennessee and Virginia.

Q. I will ask you whether or not you have any record, which you made with reference to the handling of that car? A. Yes, sir.

Q. Referring to that, please read to the jury what record you made of it? A. Here is the record of it on the train book, but I also have a check sheet, a record.

Q. Read to the jury what record you have on your train book with reference to the handling of this train? A. My train book here, I picked up a car at Middlesboro and broke the lock at Shawanee, Tenn.

Q. Broke the seal at Shawanee? A. Yes, sir.

Q. Read what record you have on your train book? A. I have the record opened up at Shawanee, run out at Appalachia; and here is my seal record—M. C. 13908 taken from Middlesboro and left at Appalachia, Va.

Q. Do you know what that car had in it? A. Merchandise for points beyond—from Middlesboro to Appalachia.

Q. Tell the jury who had the waybills for the merchandise contained in that car from Middlesboro to Appalachia? A. I did myself.

Q. You as conductor? A. Yes, sir. * * *

Q. Tell the jury whether or not you handled and unloaded the goods that were in M. C. 13908 on July 1, 1913? A. Yes, sir.

Q. Have you records showing the goods which you unloaded from that, or the points at which you unloaded goods from that car? A. I have a record of the points, but do not have any record of the goods.

Q. You do not have a record of the items, but the points? A. Yes, sir.

Q. Read that to the jury. A. My first record opens up by unloading freight at Shawanee, Tenn., out of 13908; and also unloaded freight over at Wheeler, Va.; also unloaded freight at Emory, Va.; at Hagan, Va.; also unloaded freight out of it at Benhur, Va.; also at Pennington, Va.; also unloaded it at Big Stone Gap, Va.; and that is the last.

Q. When did you do that? A. July 1, 1913.

Q. I will ask you to have this report made a part of your evidence and mark it 'H. E. H. Nos. 1 and 2.'" (The reports in question will be found in the printed record between pages 138 and 139.)

The court will observe that not only in the direct examination of plaintiff's witnesses, but in the cross-examination of defendant's witnesses, plaintiff's counsel seemingly laid emphasis on the facts: (1) That the train, No. 85 which hauled M. C. car 13908 from Corbin to Middlesboro did not go beyond the latter point or out of the State of Kentucky; and that the crew of that train did not leave Kentucky; (2) That the crew of the switch engine did not leave the State of Kentucky; and (3) That the caboose, which it is claimed injured decedent, was attached to train 86, which was moved the next day from Middlesboro to Corbin, both *termini* being in the State of Kentucky. But we submit that none of these things is material upon the proposition for decision here. That car M. C. 13908 was loaded with freight shipped in interstate commerce is not and can not be denied. The freight therein was shipped from Knoxville, Tenn., and had passed through a part of Tennessee, into and through a part of Kentucky, and back into another part of Tennessee, before any of the freight in the car was unloaded, to-wit, at Shawanee, Tenn. And the rest of the freight in the car was not unloaded until the train had again passed out of Tennessee into Virginia, and at points in the latter State between Shawanee and Norton. The interstate character of the shipment was in nowise affected by the fact that during the progress of the journey from Knoxville to Appalachia, one of the crews which handled the shipment, to-wit, from Corbin to Middlesboro, did not leave the State of Kentucky on that trip; nor by the fact that in switching the car out of train No. 85 and

back into train No. 89 at Middlesboro, the switch crew were not outside the State of Kentucky. And, touching the seeming reliance of opposing counsel on the proposition that the caboose which injured decedent was attached to a train which was to be moved between *termini* wholly within the State of Kentucky, and that this fact determined the question as to whether decedent was engaged in intrastate commerce or interstate commerce at the time he received his hurt, it is only necessary for us to refer to Second Employers' Liability Cases, 223 U. S. 1. There, one of the arguments made against the constitutionality of the Act was "that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employe through the negligence of another where all are engaged in interstate commerce, that power does not embrace instances where the negligent employe is engaged in intrastate commerce." The court thus answered the objection:

"But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power. As was said in *Southern Railway Co.* v. *United States*, 222 U. S. 20, 27, that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the source of the dangers which threaten it. The present Act, unlike the one condemned in *Employers' Liability Cases*, 207 U. S 463, deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes while engaged in such commerce. And this being so, it is not a valid objection that the Act embraces instances where the causal negligence is that of an employe engaged in intrastate commerce;

for such negligence, when operating injuriously upon an employe engaged in interstate commerce, has the same effect upon that commerce as if the negligent employe were also engaged therein."

It follows that it is entirely immaterial that the caboose which struck decedent was attached to a train which was to be moved the next day from Middlesboro to Corbin, both of them points in the State of Kentucky. And this is true, even if we assume that all of the freight on that train was moving in intrastate commerce. As to this the record is silent. But it is safe to assume that all of the freight on that train was not so moving, and that a part of it, at least, was moving in interstate commerce.

We confidently submit to the court that the foregoing excerpts from the testimony (and there is none to the contrary) conclusively demonstrate that the movement of the engine which was being made at the time decedent was hurt was for the sole purpose of getting M. C. car 13908 out of switch track No. 10, in order to incorporate that car into train 89—an interstate train moving from Middlesboro, Ky., to Norton, Va., and that the fact that the engine then had hold of an empty car which was switched to Hoe's siding the following day is immaterial. If the switch engine had then been engaged in switching the empty car to Hoe's siding, and that was the purpose of moving the engine at that time, a different question might be presented. Although, even then, we think the case would not fall within Illinois Central R. Co. v. Behrens, 233 U. S. 473, for the reason that the cars which

were being switched when Behrens was hurt were loaded and were being switched to their destinations in intrastate commerce; whereas the car for Hoe's siding was empty. But, as we have seen, the empty car was not being switched to any destination, intrastate or otherwise, at the time of the accident. It was merely being moved out of the way, just as the other twelve or fifteen cars intervening between track No. 11 and M. C. car 13908 standing on track No. 10 had to be moved out of the way, in order that the engine could reach and couple to M. C. car 13908 and switch it to the point where it was to be incorporated into train No. 89, and which was done that same night, shortly after decedent was hurt. In other words, the only reason for moving the empty car destined to Hoe's siding, and the other empty cars, at that time, was to get them out of the way so that the M. C. car could be switched into train 89. This was done several hours before the empty car was moved to Hoe's siding. And that crew did not switch the other empty cars at all to any destination, but put them back in track No. 10 and left them there, after the M. C. car had been taken therefrom and placed on train 89. If decedent and the rest of his crew were not engaged in interstate commerce in switching the interstate car, M. C. 13908, at the time decedent was hurt, the Federal Act will apply to relatively few injuries to switch yard employes, notwithstanding the fact that they are indispensable factors in interstate commerce and that it would be impossible to conduct such commerce without their aid.

THE LAW.

As against the Behrens case, *supra*, on which opposing counsel will doubtless rely, and on authority of which the Kentucky Court of Appeals seems, mainly, to have rested its decision that decedent was engaged in intrastate commerce at the time he received his fatal hurt, we rely on North Carolina R. Co. v. Zachary, etc., 232 U. S. 248, 260, on which we relied on the original hearing, together with the Pedersen and Seale cases therein cited; on N. Y. C. & H. R. R. Co. v. Carr, 238 U. S. 260; Lamphere v. Oregon R. & N. Co., *et al.*, 196 Federal 336, cited approvingly in Pedersen v. D., L. & W. R'y Co., 229 U. S. 146; and Pennsylvania R. Co. v. Donat, 239 U. S. 50, which we brought to the attention of the Court of Appeals of Kentucky in our petition for rehearing (R., 159, 171), and to Pecos & Northern Texas R'y Co. v. Rosenbloom, 240 U. S. 439, and Great Northern R'y Co. v. Otos, 239 U. S. 349, decided by this court since that time. We will now briefly state the points in those cases and quote some of the applicable language from the opinions.

In the Pedersen case the plaintiff was injured by being struck by an intrastate passenger train while he was carrying a sack of bolts or rivets over the James Avenue bridge to be used in inserting a new girder in the place of an old girder in the Duffield bridge—both bridges being in or near Hoboken, N. J. And this court held that Pedersen was engaged in interstate commerce, for the reason that the bridge was used in both interstate and intrastate commerce. That case is very applicable with

respect to the contention of the other side, in this case, that the caboose which struck decedent was attached to a train which was to move in intrastate commerce. Pedersen was struck by an intrastate train. But the court held this made no difference, if his work was incident to interstate commerce, although it was also incident to intrastate commerce. So, in the case at bar, the fact that decedent was struck by the caboose attached to the intrastate train, and the further fact that decedent's engine then had hold of a car the destination of which was a siding in Middlesboro, do not militate against the fact that inasmuch as the purpose of moving the engine at that time was to get to the M. C. car which was moving in interstate commerce that decedent was then so engaged.

In the Lamphere case, 196 Federal, 336, the plaintiff, a locomotive fireman in the employ of the railroad company, which was engaged in interstate commerce, was ordered by his superiors to report at a station to be transported with others to another station to relieve the crew of an interstate train. While approaching the station to embark for the other station at which he was to relieve the other crew, Lamphere was struck and killed, through the negligence of other servants of the railroad company who were operating an interstate train. The Circuit Court of Appeals for the Ninth Circuit, reversing the District Court, held that Lamphere was engaged in interstate commerce at the time he received his hurt, and was entitled to the benefit of the Employers' Liability Act.

St. Louis & San Francisco R. Co. v. Seale, 229 U. S. 156, was an action brought under a statute of Texas to recover damages sustained by the widow and parents of a deceased railroad yard clerk, whose duty it was to make a record of the seals on car doors, to check the cars with the conductors' lists, and to put cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing, trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from a station in Oklahoma. While so engaged he was struck and fatally injured by a switch engine, which it was claimed was negligently operated by other employes in the same yard. That case was very much like this case in several respects. There, as here, the plaintiff sought to recover under the State law; whereas the railroad company sought to have the case tried under the Federal Act. In both cases the State courts ruled adversely to the railroad companies' contention. In the Seale case, as in the case at bar, the defendant, by appropriate pleading, called attention to the existence of the Federal and State statutes, and that whether one or the other applied depended upon facts not stated in plaintiff's petition, and asked that Seale be required so to state the facts as to enable the defendant to perceive which statute was relied upon. The trial court denied this request, just as the trial court in our case denied a similar request, and the case proceeded under the State law. On writ of error, this court reversed the judgment

on the ground that the case pleaded was not proven, and the case proven was not pleaded; that the case proven was under the Federal Act, which was exclusive of all other remedies. The Texas courts predicated their ruling that the Seale case was governed by the State law upon the proposition that the railroad yard in which he was killed was a terminal for the train Seale was on his way to meet when he was struck by the switch engine, and that no cars brought to North Sherman in that train were sent forward in interstate commerce, except in other trains. This court held that the Texas courts were in error in so holding, saying:

"The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the State line. *McNeill* v. *Southern Railway Co.*, 202 U. S. 543, 559. See also *Johnson* v. *Southern Pacific Company*, 196 U. S. 1, 21."

The language last quoted answers the argument made for plaintiff in the Kentucky courts in the case at bar: that the switching of the M. C. car was not an act of interstate commerce, for the reason that the car had been brought to Middlesboro on a local train running from Corbin to Middlesboro, and had not as yet started out on its interstate journey to points in Tennessee and Virginia.

In North Carolina R. Co. v. Zachary, etc., 232 U. S. 248, Burgess, a locomotive fireman of engine No. 862, after inspecting, oiling, firing and preparing the engine for starting on a trip from Selma, N. C., to Spencer, N. C., attempted to cross certain tracks that intervened between that engine and his boarding house, when he was struck and killed by another engine in the same yards. Burgess' administrator sued under the State law of North Carolina, and, over defendant's objection, the case was tried out in the courts of North Carolina as though the State law applied. This court, in reversing the judgment, for the reason that the Federal Act should have been applied, held that it was sufficient to constitute Burgess an employe engaged in interstate commerce, that the train, the engine of which he had prepared for the journey, contained cars moving in interstate commerce, although both the *termini* of that run were in the State of North Carolina, and that Burgess' status as an interstate employe was not affected by the fact that he was temporarily absent from his train on his way to his boarding house at the time he received his injury. And it is to be borne in mind that the engine which Burgess had prepared for the journey had not then been attached to the cars, some of which contained interstate freight. The court held that this fact was legally insignificant as touching Burgess' employment in interstate commerce.

In the Behrens case, *supra* (233 U. S. 473), the court rested its decision that Behrens was engaged in intrastate commerce at the time he was killed, on the fact that he "was engaged in moving several cars, all loaded with

intrastate freight, from one part of the city to another." But the court also said in its opinion in that case:

"Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." (Citing cases.)

The opinion of this court which is probably nearest in point to the case at bar, is New York Central & Hudson River R. Co. v. Carr, 238 U. S. 260. Carr was a brakeman on a freight train running from Rochester, N. Y., to Lockport, N. Y. In other words, both of the *termini* of that run were in the State of New York. Some of the cars in the train contained interstate freight. Among those engaged in purely intrastate business were two cars at the head of the train and next to the engine, which were to be left at North Tonawanda, N. Y. When the train arrived there Carr and his fellow-servant, O'Brien, detached those two cars from the train in order to switch them into a siding at North Tonawanda. While this was being done, Carr's fellow-brakeman applied the air suddenly by breaking or uncoupling the air-hose, and the jerk thereby given the cars threw Carr from the top of one of the cars to the ground and injured him. The only

question which this court passed on was as to whether or not Carr was engaged in interstate commerce at the time he was injured. The railroad company contended he was not. The New York courts ruled otherwise. This court concurred in their view and affirmed the judgment which Carr recovered under the Federal Act. In the course of its opinion this court said:

"The railroad company insists that when the two cars were cut out of the train and backed into a siding, they lost their interstate character, so that Carr while working thereon was engaged in intrastate commerce and not entitled to recover under the Federal Employers' Liability Act. The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employes often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the State from interstate business. The present case is an instance of that kind—and many arguments have been advanced by the railway company to support its contention that, as these two cars had been cut out of the interstate train and put upon a siding, it could not be said that one working thereon was employed in interstate commerce. But the matter is not to be decided by considering the physical position of the employe at the moment of injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty; or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. *St. Louis, etc., R'y* v. *Seale*, 229 U. S. 156; *North Carolina R. R.* v. *Zachary*, 232 U. S. 248. This case is within the principle of those two decisions."

As applicable to the case at bar, we call special attention to the language in the foregoing quotation: "If he is hurt in the course of his employment while going to a car to perform an interstate duty, * * * he is entitled to the benefits of the Federal Act, although the accident occurred prior to the actual coupling of the engine to the interstate cars." So here, in order to constitute decedent an employe in interstate commerce, it was sufficient that the engine on which he was firing was on its way to get the interstate car, M. C. 13908, from track No. 10 and incorporate it into train 89 to be sent forward to points in Tennessee and Virginia, "although the accident occurred prior to the actual coupling of the engine to the interstate car."

In Pennsylvania R. Co. v. Donat, 239 U. S. 50:

"Two loaded coal cars coming from without the State were received in the carrier's yard at Fort Wayne, Ind. They were destined to Olds' private switch track connecting with the yard; and, acting under instructions, Donat commenced the switching movement necessary to place them thereon. There was evidence tending to show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged about the removal defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action (224 Fed. Rep. 1021) the Circuit Court of Appeals was clearly right. *N. Y. Cent & Hudson River R. R.* v. *Carr*, 238 U. S. 260, 262-263."

As a preface to that opinion, of which we have quoted the substantial part, the court stated that the question

presented on the writ of error was "so frivolous as not to need further argument."

In Pecos & Northern Texas Railway Co. v. Rosenbloom, 240 U. S. 439, *supra*, the suit was brought and tried under the Texas statute, over the objection of the railway company, which unavailingly asked that the court instruct the jury, in substance and effect, that plaintiff could not recover because the suit was brought under the State law when the Federal law was applicable. This court reversed the judgment because of the refusal of the trial court so to instruct the jury.

In Great Northern R'y Co. v. Otos, 239 U. S. 349, where the plaintiff proceeded under the Federal Act, and the railway company contended that plaintiff was not engaged in interstate commerce at the time he was injured, for the reason that the defective car which caused the injury had then been withdrawn from interstate commerce, this court denied the contention of the railroad company and affirmed the judgment recovered under the Federal Act, saying:

> "The car was loaded and, in fact, was carried to Minneapolis the next day. It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress."

So, too, the M. C. car in this case was subject to the Act of Congress at the time the switching movement was made in which decedent was injured, notwithstanding the

fact that the car had been left in the Middlesboro yards by an intrastate train, and had not yet resumed its movement in interstate commerce from Middlesboro to points in Tennessee and Virginia.

The facts of this case, read in the light of the foregoing decisions of this court, leave no doubt in our mind that decedent was engaged in interstate commerce at the time he received his hurt, and that the Kentucky courts erred, to defendant's serious prejudice, in holding otherwise. Indeed, if decedent was then engaged in interstate commerce, the error of which we complain is conceded, for it is said in the opinion of the Court of Appeals of Kentucky (R., 149):

"If, at the conclusion of the testimony, it had developed that Parker at the time of his injury was engaged in interstate commerce, there could have been no recovery, and appellant would have been entitled to the peremptory instruction for which it asked.

"*The controlling question in this case is whether or not at the time of his injury Parker was engaged in interstate commerce, for if he was, it is conceded by the attorney for the appellee that there can be no recovery.*"

This is necessarily so, for the reason that there is neither allegation nor evidence that decedent left any next of kin who were pecuniarily dependent upon him, or who had ever received any pecuniary benefits from him, or who had reasonable expectation of receiving any such benefits from him in the future, if he had lived. Such allegation and testimony were essential to authorize a recovery of any damages for decedent's death under the Federal Employers' Liability Act, which is exclusive of

all other remedies if decedent was engaged in interstate commerce at the time he was injured. (Michigan Central R. Co. v. Vreeland, 227 U. S. 59; American R. Co. v. Didricksen, *Ib.* 145; G. C. & S. F. R. Co. v. McGinnis, 228 U. S. 173; North Carolina R. Co. v. Zachary, 232 U. S. 248, *supra;* Garrett, Admr. v. L. & N. R. Co., 235 U. S. 308.)

To recapitulate: If decedent was engaged in interstate commerce at the time he was hurt, as we have endeavored to show the evidence demonstrates, it necessarily follows that the judgment of the Knox Circuit Court affirmed by the Court of Appeals of Kentucky is erroneous and should be reversed with directions to render judgment in favor of defendant, on the ground that plaintiff's cause of action, if any, was under the Federal Act exclusively, and he does not seek a recovery under that Act, but, on the contrary, insists that he has no cause of action under the Act, and concedes that he is not entitled to recover if the Federal Act applies. To refer again to one controlling reason why this is so: There is neither allegation nor evidence that decedent left next of kin who had a pecuniary interest in his life, or who had lost pecuniary benefits by reason of his death. And, if the Federal Act applies, the measure of damage instruction (No. 3), given the jury by the trial court, which authorized the jury, regardless of whether or not decedent left next of kin who were pecuniarily dependent upon him, to find "such a sum in damages as you may believe from the evidence will fairly and reasonably compensate *the estate* of Edward Parker, *for the destruction*

of his power and ability to earn money," not to exceed the amount claimed in plaintiff's petition (fifth assignment of error, R., 179), is vitally erroneous and was very prejudicial to defendant's substantial rights (L. & N. R. Co. v. Stewart, Admx., 241 U. S. 261); and, also, in not limiting the jury to finding only present worth, as required by C. & O. R'y Co. v. Kelly, Admx., 241 U. S. ——; *Id.* v. Gainey, etc., *Ib.* ——.

Without further argument we earnestly and confidently ask that the judgment of the Court of Appeals of Kentucky, which affirmed the judgment of the Knox Circuit Court, be reversed, with directions as above indicated.

A reversal is asked.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

July 15, 1916.

OCT 31 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 330.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED, - - - Defendant in Error.

Reply Brief for Plaintiff in Error.

In Error to the Court of Appeals of the State of Kentucky.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

October 25, 1916.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 330.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

versus

NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED, - *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

A substantial difference between our original brief for defendant (plaintiff in error) and the brief for plaintiff (defendant in error) is that in our brief all of the evidence shedding any light on the question whether the engine movement which was being made at the time decedent was hurt was in furtherance of interstate commerce or intrastate commerce, was quoted; whereas, plaintiff's brief makes only fragmentary quotations from the evidence, and omits material portions thereof. As one illustration of what we mean, see page 17 of our original brief (printed Record, pp. 128, 129), where conductor

Town testified that the only reason the engine had hold of the empty box car at the time of the accident, was because that car, as well as other empty cars, stood on the track between the engine and M. C. car 13908, which the engine was then on its way to couple to and attach to the interstate train; and that the only purpose of the movement of the empty car at that time was to get it out of the way of switching the interstate car. And there is no evidence to the contrary. In other words, there is no evidence which proves or from which it can reasonably be inferred, that the engine had hold of the empty car at the time of the accident for the purpose of switching it to Hoe's plant, or to any other destination, or elsewhere or otherwise than as we have just stated. There is nothing in the other testimony given by conductor Town, nor in that given by brakeman Tobias, which raises an issue of fact on this proposition. The testimony of the latter does not cover this point at all, and, therefore, is not, in any sense, contradictory of Town's testimony.

We submit that counsel for plaintiff is in error in arguing that the question whether the engine movement, when decedent was hurt, was in furtherance of interstate commerce or intrastate commerce, is a question of State law, as to which the finding of the State courts is conclusive upon this court. The exact question we have here was decided by this court, adversely to plaintiff's contention, in St. L., S. F. & Texas R'y Co. v. Seale, 229 U. S. 156, on authority of which defendant practiced the case at bar in the trial court. In the Seale case, as in this one, the action was brought in the State Court, not under

the Federal Act, but under State law. The railroad company contended there, as here, that decedent was injured while employed in interstate commerce, and that the carrier's liability for the death was exclusively regulated and controlled by the Federal Employers' Liability Act. The Texas courts denied this contention. On writ of error this court upheld the contention and reversed the Texas courts upon the ground that the evidence did not admit of any other view than that the case made was within the Federal statute. The court said:

"It comes then to this: The plaintiffs' petition, as ruled by the State Court, stated a case under the State statute. The defendant by its special exceptions called attention to the Federal statute and suggested that the State statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. A plea in abatement would have been unavailing, because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced it developed that the real case was not controlled by the State statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State courts erred in overruling it."

See, also, N. C. R. Co. v. Zachary, Admr. of Burgess, 232 U. S. 248, discussed on page 30 of our original brief.

As this court said in St. Louis & Iron Mountain R'y Co. v. McWhirter, 229 U. S. 265, on pp. 276, 277—an

action under the Federal Hours of Service Act—where the State Court held that the violation by the carrier of the statute was the proximate cause of McWhirter's injury, but this court held otherwise, and reversed the judgment for that reason:

"• • • But it was long since pointed out in *Neilson* v. *Lagow*, 12 How. 98, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a State Court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this, that the power to review a Federal question which has been expressly decided by a State Court does not obtain where such court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony upon the assumption that there was nothing adequate to go to the jury to show liability under the Federal law. While it is true, as we have said, that coming from a State Court the power to review is controlled by Rev. Stat., Section 709, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City So. R'y* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246."

The Court of Appeals of Kentucky recognized that if the testimony in the case at bar showed that decedent was engaged in interstate commerce at the time he was hurt, defendant so practiced the case in the lower court as to have entitled it to a peremptory instruction to the jury to find in its favor, in accordance with defendant's motion in that behalf (printed Record, p. 149; our original brief pp. 3 and 35).

Therefore, the contentions made in plaintiff's brief, that (1) the finding by the Kentucky courts that decedent was engaged in intrastate commerce at the time he was hurt is binding upon this court; and (2) that, in addition to raising the Federal question by the motion for a peremptory instruction, defendant should also have raised the question by offering instructions which would have been applicable if the case had been tried under the Federal law, notwithstanding the insistence of plaintiff and the trial court that the case was governed by State law and that such law alone was applicable, are unsound. If the case is governed by the Federal law, we submit, under the Seale case, *supra*, there can be no question that defendant sufficiently raised and saved this question. The Court of Appeals of Kentucky so held.

The only question, therefore, for this court to decide, is whether or not, under the evidence (regardless of how the Kentucky courts viewed it), decedent was engaged in interstate commerce at the time he was hurt. If he was, there can be no recovery, as the Kentucky Court of Appeals held, and the judgment should be reversed.

If, on the other hand, decedent was then engaged in intrastate commerce, the judgment should be affirmed.

We ask, as in our original brief, that the judgment be reversed.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

October 25, 1916.

FILED
OCT 23 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916, NO. 330.

Louisville & Nashville Railroad Company, - - - - - - - - Plaintiff in Error,

versus

Nathan Parker, as Administrator of the Estate of Edward Parker, Deceased, - - - Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

In Error to The Court of Appeals of The State of Kentucky.

EDWARD C. O'REAR,
Counsel for Appellant.

J. M. ROBSION,
B. G. WILLIAMS,
Of Counsel.

TABLE OF CASES AND AUTHORITIES CITED, ARRANGED IN ALPHABETICAL ORDER.

	Pages.
California Powder Works v. Davis, 151 U. S. 389	19
Clark v. Pennsylvania, 128 U. S. 395	19
Dower v. Richards, 151 U. S. 658	9
Illinois Central Railroad Co. v. Behrens, 233 U. S. 473	7, 13
New York Central & Hudson River Railroad Co. v. Carr, 238 U. S. 260	17
Pedersen v. Delaware, Lackawanna & Western Railroad Co., 229 U. S. 146	14
Pennsylvania Co. v. Donat, 239 U. S. 50	16
Schuyler Bank v. Bollong, 150 U. S. 85, 88	19

Supreme Court of the United States

OCTOBER TERM, 1916, NO. 330.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Plaintiff in Error,*

versus

NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED, - - - - - - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

STATEMENT.

This is an appeal from a judgment of the circuit court of Knox county, Kentucky, awarding defendant in error $7,000.00 in damages for the death of his intestate, which was affirmed by the Kentucky Court of Appeals. (165 Ky. 658.)

Decedent was employed by the plaintiff in error as fireman on its switch engine operating in its railroad

yards at Middlesboro, Kentucky. He was fatally injured while in the cab of his moving engine by coming in contact with a freight caboose standing on another track. This caboose had been negligently left by the railroad company in such position that it did not clear or leave unobstructed the entrance to the track into which the engine was moving at the time of decedent's injury.

At the time of the accident, the engine had hold of an empty box car, destined to be loaded in Middlesboro, Kentucky, and which had been picked up in another part of the yard. This empty box car was then being placed by the engine on track No. 10 and was the only car attached to the engine at the time of the accident. There is an issue in the evidence that, after so placing this empty car, the engine was, in the same movement, going to remove from said track No. 10 a loaded interstate car, to be placed in an outgoing interstate train. The operation of placing this empty intrastate box car in track No. 10 had not been completed when the accident occurred.

ARGUMENT.

The theory of the plaintiff in error is that the evidence shows that at the time of the injury sued for, the immediate objective of the operation in which the switching crew was then engaged was the removal of the loaded interstate car referred to.

The theory of the defendant in error is that the evidence shows that at the time of the injury sued for the immediate objective of the operation in which the switching crew was then engaged was the removal and

placing of this empty intrastate car on track No. 10, or, in connection with another empty car on track No. 10, to be moved and placed on the furnace siding.

We concede, if the uncontradicted evidence shows that at the time of the injury to decedent, the object of that particular switching movement the yard crew were then making, was the transfer of this interstate car, decedent was then engaged in interstate commerce.

However, we contend this is not shown. The only conflict in the evidence on this point is, whether, after so placing this empty intrastate car, the yard crew then, in the same movement, intended to move from the same track the loaded interstate car. It is our contention that this latter intention or objective is immaterial.

The only witnesses who testified on this subject are George Tobias, a brakeman in the yard crew, and W. R. Town, the conductor or foreman of the yard crew. Tobias testified as follows:

(R., 56.)

"Q. What was your crew doing at the time Parker was killed? A. They had hold of two cars—one was going in 9 and going in with number 10 near the heading.

Q. You say you were going—you had a car up in 9 and one to go in 10? A. Going in 10 the car I had hold of."

What the witness was here testifying to (as explained by his subsequent testimony and that of the yard foreman) was that a car had been placed on track No. 9 immediately before the movement in question, and that the engine was at that time going in track No. 10 with another car. He further testified:

(R., 57.)

"Q. That night when you put the car in No. 9, as you say, and was going into track No. 10, when Parker was killed, was anything on No. 11 track? A. Yes, sir."

(R., 66.)

"Q. What were you going to do with the car you were putting in No. 10? A. I think it was going to Mr. Hoe.

Q. Who is Mr. Hoe? A. He runs a business.

Q. It was being put there in Middlesboro? A. Yes, sir."

(R., 68.)

"Q. That night didn't he (the foreman) line it (track No. 10) up *and direct you to have the engineer to move this car in No. 10* that night before Parker was killed? A. He told me to enter 9 and go in 10.

Q. Didn't Mr. Town, in charge of the work there, direct you and Smith to signal the engineer *and for him to put that car in No. 10 there?* Didn't Mr. Town direct you to do that? A. Yes, sir.

Q. Tell the jury whether or not you would have signalled the engineer there, *or made any effort to put that car in No. 10* before Mr. Parker was killed if Town had not directed you to do it? A. No, sir." (Italics mine.)

(R., 74.)

"Q. I believe Mr. Robsion asked you in detail about placing cars on track No. 9. Tell the jury what you had done after the engine had gone out of track No. 9. A. We backed in No. 10 with the head car. That one car."

(R., 78.)

"Q. Where did you get instructions from Mr. Town to put that car in 10? A. Taken from the conductor.

Q. How long were you putting it in there? A. Before putting it in 10?

Q. Yes? A. We was backing in there with it.

Q. *How long before you backed in there with it had you got instructions from Mr. Town to put it in there?* A. Seven or eight minutes, I suppose." (Italics mine.)

This is all of this witness' testimony on this point. He was introduced by the plaintiff. We submit its effect, in substance, is that at the time of the injury to decedent, the immediate operation in which this switch crew was engaged was the placing of this empty car (which was to be loaded out of that yard) on track No. 10. The witness testifies unequivocally that what *he* was then doing (he being the one who was directing the movements of the switch engine) was obeying the instructions of the foreman, Town, to put this empty car in No. 10. No other construction can be placed on his evidence.

The railroad company relies upon the testimony of Town, the yard foreman, to support its theory that the immediate movement in which the switch engine was engaged at the time of the injury to decedent was the transfer of the loaded interstate car on track No. 10 to an outgoing train which was being made up on another track. However, we call the attention of the court to the fact that Town does not pretend to deny that they were then placing this empty intrastate car on track No. 10.

As corroborative of the testimony of brakeman Tobias heretofore alluded to, that Town had directed him to place this empty car on track No. 10, and that was what the crew were then doing. Town testified:

(R., 113.)

"Q. What did your brakeman do with reference to the moving of the cars you directed them to move? A. Go ahead and move them as I told them.

Q. How would they be moved? A. If I wanted a car put in No. 5 or 10, or put on a train to go out of there, I would tell them to throw that car on track so and so."

A significant feature of the evidence on this question—significant because of its meagerness—is, *why was this empty intrastate car attached to the engine at this time at all?* What was that switch crew doing hauling it around over the yard? Town testified in regard to this as follows, which is the only testimony in the record on the subject:

(R., 129.)

"Q. This car that you had put in 9 and when that was attached to the engine and just before you went into 10, and also the one you had attached to your engine when you went into 10, where did you get them? A. I expect these were (No.) 87 cars *I was putting in the proper place with them,* possibly this car come out of 87 train, or this car was going in 9 to be switched or weighed." (Italics mine.)

And he further testified as to this switching movement:

(R., 117.)

"Q. How were you to go about getting that (interstate) freight car? A. I was to couple to them (the intervening cars, one of them being then attached to his engine) *and they went back in No. 10 and stayed."* (Italics mine.)

We submit to the court that even if, as the foreman says, it was one of the purposes of this movement of the engine to bring this interstate car out from track No. 10, it was the primary purpose, in going into track No. 10, to place there "in the proper place" this empty intrastate car then attached to the engine. Town testified that this empty was a car "I was putting in the proper place." He had not yet put it "in the proper place" when the accident happened. The engine and car were then just entering track No. 10. The brakeman, Tobias, testifies unequivocally that the object was to put this car on that track, No. 10—that he had been instructed by the foreman to so place it—and does not qualify his testimony, as does Town, by saying they were then going to bring out an interstate car, between which and the car they were putting in there intervened some twelve or fifteen other cars.

We submit that both the putting in of this empty intrastate car and the removal of the loaded interstate car may be considered to have been within the contemplation of the yard crew in going into this track No. 10. But the first thing they were going to do, as shown by the uncontradicted evidence, *was to put this empty car in that track;* and this had not been completed when the accident occurred. This brings the case in hand, as well said by the Kentucky Court of Appeals, within the rule announced by your Honors in *Illinois Central Railroad Co. v. Behrens,* 233 U. S. 473, a case involving an injury to a switchman who was at the time immediately engaged in switching intrastate cars:

"That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

There is conflict in the evidence whether the movement in question had any connection with the transfer of this interstate car.

The evidence is that the primary purpose of the switching movement in question was to place this empty intrastate car, then attached to the engine, in track No. 10. This being true, it is immaterial in what movement the crew was next going to engage.

It is not by any means certain whether the engine on which Parker was killed was, at the time, on its way to then get car M. C. 13908. An inference to that effect is allowable upon the testimony of witness Town alone. But, as has been shown, the contrary may be gathered from the testimony of the witness Tobias. Another significant feature of the evidence is, the card by which the crew was working directed the "giving" of two empty box cars ("EBX Cars") to the furnace, and one empty box car to the tannery (R., 128). The car attached to the engine at the time of the accident was evidently one of the two cars destined for the furnace. In fact, it was delivered to the furnace later on during that night ("in the morning after some time between that time and time I was quitting next morning." R., 117). Tobias understood at the time it was so destined (R., 66). Town says (R., 117) there were twelve or fifteen cars standing on track 10 before M. C. car 13908 was reached, and some of them, at least, were empties. Whether the

card was executed consecutively—from top to bottom—or according to convenience, it would therefore appear that the delivery of this box car then attached to the engine would precede the putting of M. C. 13908 into train 89. Nor does Town testify when he put car 13908 into train No. 89. The "Conductor's Freight Check" (Exhibit "H. E. H. No. 1") (R., 138), shows the conductor of train 89 received the car on July 1, 1913; hour not stated.

The primary question of fact for decision, therefore, was: Was the movement of the empty car attached to the engine at the time of the accident an act isolated from the movement of car M. C. 13908? Or, was the engine at that time moving to then get car M. C. 13908 to transfer it to train No. 89?

The trial court might have submitted the question to the jury. But, instead of submitting it, the court decided it outright, holding it was an isolated act, therefore, an intrastate transaction. Whether some other tribunal might decide the same question otherwise, giving more credit to Town and less to Tobias and the working card, is beside the question. That finding of fact was affirmed by the Kentucky Court of Appeals.

Whatever might be the rule of law to be applied if the fact was, the injured employe was taking his engine into a sidetrack to get out an interstate car, and was injured on the way by a projecting car, it is not here for decision. The fact which controls this case, in its Federal aspect, is as found by the State court.

In *Dower v. Richards*, 151 U. S. 658, the question was whether a plot of land underlaid by a ledge of gold-

bearing rock, was excepted from the United States statutes excepting such property from town-site patent where the gold-bearing stratum was not of practical value. The State court in which the suit originated found the fact to be that the ledge had previously been worked out and abandoned as no longer containing gold-bearing rock in quantities sufficiently valuable to be worked. The Supreme Court of the State affirmed the judgment of the trial court on that finding of fact. Said this court:

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of evidence in the case. But to review the decision of the State court upon the question of fact is not within the jurisdiction of this court."

In the instant case it must have appeared affirmatively that the movement of the car in which Parker was killed was an interstate transaction, before the Federal question could be presented. If the evidence be such as that the controlling fact might in truth be one way or the other—according to the weight accorded the evidence, upon the credibility of the witnesses, or other controlling factor—the decision of that question of fact one way by the State court eliminates the other hypothesis of fact. As, therefore, it does not appear conclusively that the movement of the engine was in interstate traffic, but on the contrary the trial court found the fact to be it was not so moving, I submit there is no Federal question here for decision.

The opinion of the Kentucky Court of Appeals is found at page 148 of the record. A careful reading of that opinion discloses that it is based upon the finding of fact by the trial court that the immediate operation in which decedent was engaged at the time of his injury was (R., 152) "switching this intrastate car from one part of the yard to another, and expected shortly thereafter to remove from track No. 10 some twelve or fifteen cars so that it might switch the interstate car to another track."

This statement found in the opinion of the Kentucky court (R., 152): "That it (the engine) was engaged at the time in switching intrastate cars so that it might ultimately get at and switch to another track the interstate car," does not mean that the particular movement was to clear the way so as to get at the interstate car, but that in the course of the execution of a number of movements, each having its own definite objective, it would result ultimately that the interstate car would be reached and also handled. There is no evidence that the switching of this empty intrastate car to track No. 10 was for the ultimate purpose of getting at and switching to another track the interstate car. It was being put in there—in its proper place, for the present—and went back in there and stayed, until in the course of the night's work it was to be removed to its destination, the furnace track. The putting of this empty car in track No. 10 had no connection with the subsequent removal of the interstate car from that track, except that, inasmuch as the engine was then working on that track, and its next work might include, or might not, the handling

of the interstate car, it was as practical railroading under existing conditions (not clearly shown in the record) might suggest to the workmen in charge.

What if it was the ultimate intention of the crew in going in track No. 10 to transfer this loaded interstate car after they had put in its proper place on that track the empty intrastate car they then had? They did not commence the second operation until they had completed the first, nor was the second operation their primary objective. It was doubtless their ultimate intention to remove this empty intrastate car to Hoe's siding some time during the night (and they did do so), but it was not their present intention to do so. Their present intention was to put it in its proper place on track No. 10. Why this was the present proper place for it was doubtless well known to the yard crew—perhaps it was a matter of convenience in the completion of the final operation of switching the car to Hoe's siding. It was doubtless their intention, after they placed this car, then attached to their engine, on track No. 10, to switch that night a great many other cars containing interstate freight besides the car M. C. 13908 that happened to be also on track No. 10.

So, the question for decision, we take it, is, whether a yard switching crew, then engaged in switching an intrastate car from one track in the yard to another, which operation had not been completed, and expecting shortly thereafter to remove from the track upon which it was then placing the empty intrastate car, a loaded interstate car, is engaged in intrastate or interstate commerce.

We have already adverted in this brief to the opinion in *Illinois Central Railroad Co. v. Behrens,* 233 U. S. 473. It was the rule laid down in this opinion that the Kentucky courts applied to the proven facts in this case in their holding that decedent was engaged in intrastate commerce at the time of his injury.

The facts in the Behrens case (which with a change in the name of the city and State where the accident occurred could be said to be the facts in this case), as recited in the opinion, were as follows (p. 476):

"The intestate was in the service of the railroad company as a member of a crew attached to a switch engine operated exclusively within the city of New Orleans. He was the fireman, and came to his death, while at his post of duty, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the State or *vice versa,* at other times was moving only between points within the State, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded, *and oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere.* In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State. The question of law upon

which the Circuit Court of Appeals desires instruction is, whether upon these facts it can be said that the intestate at the time of his fatal injury, was employed in interstate commerce within the meaning of the Employers' Liability Act." (Italics mine.)

In response to that request for instruction as to the law, this court said (p. 477):

"Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'Section 1. That every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.' Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce. The act was so construed in *Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employe is engaged by the carrier in such commerce.' Again (p. 152): 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases. (Citing cases.)

"Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another.

That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

The Kentucky Court of Appeals, following the *Behrens* case, applied the rule that each separate movement of a yard-engine switching crew is a complete operation within itself, and that no one of them affects the quality of the other, respecting the application of the Federal statute. As here, when it is the intention of the yard crew to subsequently and in the same operation remove a loaded interstate car from the same track upon which they are then placing an empty intrastate car, the placing of the empty intrastate car on the track is a complete operation in itself, and the crew is engaged in intrastate commerce until that operation is completed.

To adopt the reasoning of the plaintiff in error will lead to an absurdity in the construction of the Federal Employers' Liability Act; for almost every railroad operation would be held to be an act in furtherance of interstate commerce—the movement of intrastate trains, or intrastate freight, would be attributed to clearing the road, or clearing the space occupied, for the movement of interstate trains or interstate freight.

We submit it is not the ultimate purpose or object in which a switching crew is engaged that determines the character of commerce in which it is engaged, *but what they are actually doing at the time of the injury*—their immediate objective—that controls.

Plaintiff in error cites *Pennsylvania Co. v. Donat*, 239 U. S. 50. In that case the court held that, under the circumstances, *it was not error to submit to the jury* the question of whether the employe was engaged in interstate commerce at the time of his injury. This court said (p. 52):

"Two loaded coal cars coming from without the State were received in the carrier's yard at Fort Wayne, Indiana. They were destined to Olds' private switch-track connecting with the yard; and, acting under instructions, Donat commenced the switching movement requisite to place them thereon. There was evidence tending to show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private switch. While engaged about the removal defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action the Circuit Court of Appeals was clearly right."

The court did not hold that under the evidence Donat was engaged in interstate commerce, nor did it hold that if he was injured while engaged in removing the two empty cars mentioned, he was engaged in interstate commerce. The removal of the empty intrastate cars from the switch was only an incidental act to the completion of the prime objective—the placing of the loaded interstate cars on the switch. That differs from the case in hand, for the reason that here there is evidence that the removal of this loaded interstate car from track No. 10 was not the prime objective on which the switching crew was then engaged—but that the prime objective of the movement in question was to place this

empty intrastate car on track No. 10, and *then, later,* remove therefrom the loaded interstate car.

Plaintiff in error also cites *New York Central & Hudson River Railroad Co. v. Carr,* 238 U. S. 260, to support its contention that plaintiff in error was engaged in interstate commerce at the time of his injury. There, the court said:

> "The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey."

The object to be accomplished in the *Carr* case was the completion of the journey of the interstate train between its termini. To make that case apply to this case, it must be held that the object of this switching crew was to facilitate the passage through this yard of interstate commerce. But this cannot be held to be its ultimate object, much less its sole or controlling object. In *Illinois Central Railroad Co. v. Behrens, supra,* it was held that, where a yard switching crew "handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other," the true test always is: Is the particular or immediate act or operation in question directed to the movement of intrastate or interstate commerce? What is the immediate thing to be accomplished?

Plaintiff in error is insisting the trial court should have directed a verdict for the defendant upon the ground that the evidence showed Parker was employed in interstate commerce at the time of his accident, and, therefore, the Kentucky statute, under which the case

was practiced, could not apply. But it is overlooked that the plaintiff tendered an amended petition, before the trial, in which it pleaded the Federal statute, and facts bringing the case within it. The trial court refused to allow it filed, to which plaintiff duly excepted (R., 18). True, the bill of exceptions states that plaintiff's counsel announced to the court that he would not be able to prove the case under the Federal statute. Still, he did not withdraw his amendment, but was insisting on its being filed, as shown by the exceptions taken. So, if the court had been of opinion, or it were true, that the evidence showed the case to be within the Federal statute exclusively, the trial court should have instructed under that statute. But plaintiff in error did not ask for such instructions. The defendant in error presented such pleadings as fully apprised plaintiff in error of the nature of the case. The parties went to trial under such proceedings as would have enabled the plaintiff in error to have had the case submitted to the jury under instructions submitting to them the measure of recovery fixed by the Federal statute, had plaintiff in error moved for such. Instead, it relied on the practice of moving a non-suit—a failure of evidence. Whichever view we take of the evidence, whether it shows the particular employment to have been interstate or intrastate commerce, there was not a failure of proof. Plaintiff in error took and had the advantage of the plea of contributory negligence, which under the State statute is a bar. We submit plaintiff in error has not suffered prejudice of its substantial rights in this case. It does not complain now that a wrong measure of dam-

ages was applied by the jury, or that the verdict was excessive; or that it was surprised by the admission of evidence of the character of the service in which Parker was killed. It says in effect the trial court erred in refusing to file the amended petition bringing the case expressly within the Federal statute, and as it failed to let the amendment be filed, the trial court then erred in not committing the further error of directing a verdict for the defendant in the face of all the testimony in the record. We submit the allegations of the petition were broad enough to have admitted the evidence showing the movement of the car when Parker was killed was an interstate movement, and in fact all the evidence tending to establish that theory was admitted. All that was needed was the giving of the law to the jury submitting the case to them under the appropriate measure of damages. Plaintiff in error failing to ask for instructions different from those given, and having failed to urge that failure to properly instruct the jury under the Federal statute to the State court for reversal, we submit it is too late to present the question for the first time in this court. *California Powder Works v. Davis,* 151 U. S. 389; *Clark v. Pennsylvania,* 128 U. S. 395; *Schuyler Bank v. Bollong,* 150 U. S. 85, 88.

An affirmance is asked.

Respectfully submitted,

EDWARD C. O'REAR,
Counsel for Appellant.

J. M. ROBSION,
B. G. WILLIAMS,
Of Counsel.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* PARKER, ADMINISTRATOR OF PARKER.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 330. Submitted November 1, 1916.—Decided November 13, 1916.

Plaintiff's intestate was killed while moving an engine with attached intrastate car. There was evidence, strong but not conclusive, that the purpose of the movement was to reach and move another car in interstate commerce. Not asking to have this considered by the jury, defendant unsuccessfully insisted that the trial judge deal with the case as a case of interstate commerce governed by the Federal Employers' Liability Act. The case went to the jury as one dependent on the state law, and there was a money verdict which admittedly could not be sustained if the federal act applied.

Held that not the intrastate character of the moving car, as erroneously held by the court below, but the purpose of the operation involving the movement, must determine whether deceased was engaged in interstate commerce.

That the purpose was for the jury to determine; and defendant, not having sought the jury, or made any request or objection in the trial court which was not rightly overruled, could not complain of the verdict.

165 Kentucky, 658, affirmed.

THE case is stated in the opinion.

Mr. Benjamin D. Warfield for plaintiff in error.

Mr. Edward C. O'Rear, with whom *Mr. J. M. Robsion* and *Mr. B. G. Williams* were on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff's intestate was a fireman upon a switching engine which was moving upon a switch track. A caboose stood upon the main track so near to where the engine moved that the deceased struck it and was killed. His administrator brought this action against the Railroad, the plaintiff in error, for causing the intestate's death and got a verdict which, it is admitted, cannot be sustained if the deceased was engaged in interstate commerce. The dealings of the state courts with that question are the ground for the present writ of error. The judgment for the plaintiff was affirmed by the Court of Appeals, 165 Kentucky, 658.

The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the Court of Appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois Central R. R. Co.* v. *Behrens*, 233 U. S. 473, 478, and doing the act for

the purpose of furthering the later work. See *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 263. *Pennsylvania Company* v. *Donat*, 239 U. S. 50. *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55, 62, 63.

But it is necessary to see how the case was dealt with in the trial court. The Railroad Company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict, on the ground among others, that it appeared as matter of law that he was so engaged. But if the question had been left to the jury and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce there would have been no error of law in allowing a verdict for the plaintiff to stand. It is true that the Judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary and as the Railroad did not ask to go to the jury and the only ruling requested was properly denied the judgment must stand.

Judgment affirmed.